



Vicki McKenney, et al.
vs.
Nicholas Mangino, et al.
Docket No. 2:15-cv-73-JDL

Videotaped Deposition of:
Kenneth Wallentine

Date Taken: November 20, 2015

Alpine Court Reporting
Location in Salt Lake City and Provo
801-691-1000

Kenneth Wallentine
November 20, 2015

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UNITED STATES DISTRICT COURT
District of Maine
-00o-

VICKI MCKENNEY, individually;) Docket No.
and VICKI MCKENNEY, as Next) 2:15-cv-73-JDL
Friend of STEPHEN MCKENNEY,)
and as Personal)
Representative of THE ESTATE)
OF STEPHEN MCKENNEY,)
Plaintiffs,)
v.)
NICHOLAS MANGINO; and)
CUMBERLAND COUNTY SHERIFF'S)
OFFICE, and WINDHAM POLICE)
DEPARTMENT,)
Defendants.)

VIDEOTAPED DEPOSITION OF KEN WALLENTINE

Taken on Friday, November 20, 2015
At 9:05 a.m.

At Alpine Court Reporting Salt Lake City
243 East 400 South, Suite B-101
Salt Lake City, Utah 84111

Reported by: Emily A. Gibb, RPR, CSR, CCR

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25 Also Present:

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27 * * *

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1 I N D E X
2 KEN WALLENTINE PAGE
3 Examination by Mr. Lilley 5

4 * * *

5 E X H I B I T S
6 EXHIBIT DESCRIPTION PAGE
7 Exhibit B-1 - Photograph 222
8 Exhibit B-2 - Pages 172 through 175 from the 222
9 Deposition of Nicholas Mangino

10 Exhibit B-3 - Still Shot from Video 222
11 Exhibit 1 - Force Science Institute Documents **
12 Exhibit 2 - Force Science Institute Documents **
13 Exhibit 3 - Force Science Institute Documents **
14 Exhibit 4 - Force Science Institute Documents **
15 ** Exhibits 1-4 were retained by Counsel. **
16 * * *

P R O C E E D I N G S
-00o-

4 VIDEOGRAPHER: This is the videotaped
5 deposition of Kenneth Wallentine in the matter of
6 Vicki McKenney, et al., versus Nicholas Mangino,
7 et al., being held at the office of Alpine Court
8 Reporting in Salt Lake City, Utah, on the 20th of
9 November 2015 at 9:05 a.m.

10 Will counsel please state their names and
11 who they represent for the record.

12 MR. LILLEY: My name is Dan Lilley. I
13 represent Vicki McKenney and the estate of Stephen
14 McKenney.

15 MR. MARCHESI: My name is Peter Marchesi. I
16 represent the Cumberland County defendants.

17 MR. BENJAMIN: My name is Ed Benjamin. I
18 represent the Town of Windham.

19 VIDEOGRAPHER: Will the court reporter
20 please swear in the witness.

21 MR. LILLEY: Hold on just a moment, please.
22 Here is the check, your check for a thousand
23 dollars that you requested.

24 (Handing check to witness.)

25 MR. LILLEY: Now you may swear the witness.

1 (Pages 1 to 4)

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1 Thereupon --

2 KEN WALLENTINE,
3 was called as a witness, and having been first duly
4 sworn to tell the truth, the whole truth, and nothing
5 but the truth, testified as follows:

6
7 MR. LILLEY: And for our purposes, Madam
8 Court Reporter, would you please keep track of the
9 times we start and the times we break and come back,
10 lunch hour, and et cetera.

11 THE COURT REPORTER: I will.

12 MR. LILLEY: Thank you.

13
14 EXAMINATION

15 BY MR. LILLEY:

16 Q. Good morning, sir.

17 What is your name?

18 A. Ken Wallentine.

19 Q. And, Mr. Wallentine, what town or city do
20 you reside in?

21 A. Salt Lake City.

22 Q. Okay. And what is your occupation?

23 A. I'm a police officer.

24 Q. Okay. Are you currently active in the
25 police department?

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1 A. Yes.

2 Q. What -- what department is that?

3 A. I'm a special agent with the Investigation
4 Division of the Utah Attorney General.

5 Q. Okay. What are the duties and
6 responsibilities briefly of that job?

7 A. That would depend on the particular
8 assignment within the organization. My current
9 assignment involves operating a force training
10 center.

11 Q. What does that mean, "force training
12 center"?

13 A. A center where there is training about
14 force.

15 Q. Well, okay. Tell me more about what force
16 you're talking about.

17 What does it do?

18 A. Force by law enforcement officers.

19 Q. Well, can you be more specific as to what
20 kind of things you do with regard to training?

21 A. Oversee the delivery of training to police
22 officers, state troopers, corrections officials,
23 deputy sheriffs, and others who visit the force
24 training center.

25 Q. Do you -- is this restricted to this state,

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1 to Utah?

2 A. I don't believe we've yet had anyone from
3 another state.

4 Q. Okay.

5 A. But I wouldn't use the term "restricted."

6 Q. What would you use? You're saying it's
7 not -- it's -- so far, you've only used it in Utah;
8 is that correct?

9 A. I'm -- I'm saying I wouldn't use the term
10 restricted. No one has ever told me that it's
11 restricted.

12 Q. Well, sir, all I'm asking you, have you ever
13 taught any of these courses outside of Utah?

14 A. The facility is a -- a -- a standing
15 facility, so it's a -- a building.

16 Q. Okay.

17 A. No. I -- we -- we've not moved the building
18 outside of the state of Utah.

19 Q. No, I'm sure you haven't.

20 Have you moved your teaching techniques out
21 of the state of Utah, out of the same auspices of
22 your position with the attorney general?

23 A. No.

24 Q. You were asked to bring many things to the
25 deposition here with you today.

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1 Do you recall?

2 MR. MARCHESI: I'm going to --

3 THE WITNESS: I do not.

4 MR. MARCHESI: -- place an objection on the
5 record. The request was made by a subpoena which was
6 provided to counsel but not served as required by the
7 rules, so I don't believe the witness is under any
8 rule-based or court-based compulsion to produce
9 documents.

10 Nevertheless, I've asked the witness to
11 bring with him his entire file in this matter. My
12 understanding is that he has done that.

13 BY MR. LILLEY:

14 Q. Okay. So do you -- have you brought your
15 entire file in this matter?

16 A. I have.

17 Q. All right. Is it here in this room?

18 A. It is.

19 Q. Where is it?

20 A. It's sitting here behind me --

21 Q. Okay.

22 A. -- on the floor.

23 Q. I think we're going to have to do an
24 inventory, if we can, of it. So if you want to
25 start, we'll go through it, if we may.

<p>Page 9</p> <p>1 Why don't we start by you explaining what 2 you have there and we'll see what we're going to need 3 copied, if anything. Just explain to me what it is 4 and let me look at it briefly and I'll give it back 5 to you.</p> <p>6 A. The first set of documents appears to be 7 Defendant Windham Police Department's Responses to 8 Plaintiff's First Request for Production of 9 Documents.</p> <p>10 Q. May I see it?</p> <p>11 A. Certainly.</p> <p>12 Q. Okay. Let's turn that over, if we may.</p> <p>13 A. The next set of documents appears to be the 14 Cumberland County Sheriff's Office Training 15 Documentation Form and documentation of training file 16 for Nicholas Mangino.</p> <p>17 Q. Thank you. I'll look that over for a 18 moment. Let me stop you for a moment. I -- I've 19 looked it over briefly.</p> <p>20 You've read that -- that document, the 21 training document manual?</p> <p>22 A. I --</p> <p>23 Q. For Mr. Mangino. I'm sorry.</p> <p>24 A. I believe at one point, I looked at each one 25 of those pages. I don't have any recollection of</p>	<p>1 that right now.</p> <p>2 Q. Okay.</p> <p>3 MR. LILLEY: I'm going to need a copy of 4 some of this stuff, folks. I don't think I have 5 this.</p> <p>6 MR. MARCHESI: You've got all of it.</p> <p>7 MR. LILLEY: I'm going to need a copy 8 anyway.</p> <p>9 BY MR. LILLEY:</p> <p>10 Q. With regard to the issues of use of force by 11 police officers, did you recall reviewing that in 12 particular since it's the subject of this case?</p> <p>13 A. By the preposition "that," if you're 14 referring to the stack of documents, my answer would 15 be the same as I gave you a moment ago. At one 16 point, I believe I looked at every page in there.</p> <p>17 Q. Okay. Do -- can you look up the Active 18 Shooter Response section for me for a moment? We'll 19 continue on the other documents after this. I'll 20 digress here for a moment.</p> <p>21 A. And is that the title of the document you'd 22 like me to be looking for?</p> <p>23 Q. Well, I'm looking at the index. If you'd go 24 back to the front page, it refers to -- I believe -- 25 I'd have to see it again because I don't have a copy.</p>
<p>Page 11</p> <p>1 A. I see the words "Active Shooter Response" --</p> <p>2 Q. Yes.</p> <p>3 A. -- on this document.</p> <p>4 Q. Yes, that's what I'm looking for from --</p> <p>5 from that index.</p> <p>6 A. Okay. Okay. (Witness reviewing documents.)</p> <p>7 I reviewed a document. I don't see a</p> <p>8 document caption or title active shooter. I see a</p> <p>9 few documents where there's reference to concepts</p> <p>10 associated with that phenomenon.</p> <p>11 Q. You see documents that are associated with</p> <p>12 the concepts associated with active shooter response?</p> <p>13 A. Correct.</p> <p>14 Q. Well, that's what I was looking for.</p> <p>15 So do you have -- have you made any effort</p> <p>16 to -- to segregate those?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. Let me look at it, if I may.</p> <p>19 And which are the ones that you've</p> <p>20 segregated?</p> <p>21 A. They're -- turn -- turn down toward the</p> <p>22 bottom.</p> <p>23 Q. I'm going to take this out. I don't -- I --</p> <p>24 I take it it's in no particular sequence --</p> <p>25 A. It is in sequence.</p>	<p>Page 12</p> <p>1 Q. It is?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. Well, we'll try to keep it in</p> <p>4 sequence. Can you put it back in sequence? Should I</p> <p>5 shuffle it around?</p> <p>6 A. Probably not.</p> <p>7 Q. So I'm looking at the first portion that you</p> <p>8 segregated in answer to my question. Looks like Case</p> <p>9 Law Update.</p> <p>10 Do you agree?</p> <p>11 A. Yes, that's from a document titled 2014 Case</p> <p>12 Law Update.</p> <p>13 Q. Okay. And this essentially talks about</p> <p>14 First Circuit courts -- well, at least the first one</p> <p>15 is First Circuit Court of Appeals case, and then it</p> <p>16 goes on to the cases from what I see; is that</p> <p>17 correct?</p> <p>18 A. No.</p> <p>19 Q. No? Okay. Then you describe what it is.</p> <p>20 A. The page that you're looking at discusses</p> <p>21 the Ricker case. That was a decision by the United</p> <p>22 States Supreme Court. So I suppose --</p> <p>23 Q. I'm looking at the second page here where it</p> <p>24 says First Circuit Court of Appeals.</p> <p>25 A. Yes, you -- you are correct that the second</p>

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1 page refers to First Circuit Court of Appeals. You
2 are not correct, as you stated, that the first page
3 refers to the First Circuit Court of Appeals.

4 Q. That's what I think I said, the second page.
5 That's all right.

6 In any event, the second page is the First
7 Circuit Court of Appeals, and these are cases that
8 you -- what did you conclude with regard to
9 Mr. Mangino's exposure to this material, if any?

10 A. By -- by "this," do you --

11 Q. This material that you've handed me and that
12 whole document, and now you've segregated out parts
13 of it, what is your understanding his familiarity or
14 his exposure to this material is in your review of
15 this case?

16 A. Just insofar as segregation, I -- I realize
17 you've selected something out of there that I -- I
18 did not, and you're asking me questions about
19 something that I did not segregate --

20 Q. No, sir. I'm just asking what his exposure
21 is to the entire information.

22 A. Let -- let me finish my answer, please,
23 before you --

24 Q. Okay.

25 A. -- clarify.

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1 Q. Yes.

2 A. The portion you've picked out, I didn't pay
3 any particular attention to. You have a page on the
4 top that refers to concepts involving active shooter,
5 and it would be my impression that Mr. Mangino would
6 have been provided that material in a course.

7 It's a -- the -- the front page of that
8 entire group is captioned as a course outline and
9 lists a couple of presenters at a time and date
10 indicating that it was a discrete course. And
11 because it's in Mr. Mangino's files, I believe that
12 Deputy Mangino participated in that training.

13 Q. Have you ever verified that with anybody?

14 A. I have not.

15 Q. You have -- you've interviewed him, have you
16 not?

17 A. I have.

18 Q. Did you ask him?

19 A. I did not.

20 Q. So you don't know whether he's read any of
21 this material whatsoever.

22 A. I don't have any certain knowledge that he
23 did.

24 Q. Do you have any knowledge that he did?

25 A. No.

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1 Q. And these are essentially case -- cases from
2 the courts, No. 1, correct, so far?

3 A. They're documents relating to cases from
4 courts, yes.

5 Q. And then there are -- are there hypothetical
6 cases in here of events that may not have been
7 addressed by courts?

8 A. I'd need to review the documents again --

9 Q. Okay.

10 A. -- to answer that.

11 Q. Well, we'll --

12 In any event, did you -- when you
13 interviewed Mr. -- I'm going to put this back I think
14 the way I got it. I hope at least. Probably not,
15 but I'll -- I'll do my best not to mess it up
16 anymore. And you can straighten it if you wish.

17 When you talked to Mr. Mangino, did you
18 determine what courses or training he had on the use
19 of deadly force similar to the issues that we're
20 looking at in this case?

21 A. I discussed his law enforcement training
22 with him.

23 Q. You did?

24 A. I did.

25 Q. And do you recall what specific training he

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1 had with regard to the use of force in similar
2 situations that we face in this case?

3 A. I recall that he told me that he completed
4 use of force training at the Maine Police Academy. I
5 don't recall that I asked him about whether the
6 situations were substantially similar to this case or
7 not.

8 Q. Well, do you know what the Maine police
9 academy taught for use of force when he took it?

10 A. I have seen general outlines from the Maine
11 Police Academy on use of force and have a general
12 sense.

13 Q. Do you have that among your materials?

14 A. I do not.

15 Q. Where did you look -- where did you see that
16 material?

17 A. I've seen those documents in the past.

18 Q. Can you recall any principles that they
19 espouse?

20 A. I recall thinking that the Maine Police
21 Academy with respect to Fourth Amendment issues,
22 including use of force to effect detentions, arrests,
23 and seizures, was not inconsistent with that which is
24 taught throughout the country and -- and that which
25 is based on United States Supreme Court

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1 interpretation of constitutional law.

2 Q. My -- my question is much more specific,
3 sir. I understand search and seizure and all those
4 issues that you've referenced.

5 Do you remember anything -- do you recall
6 anything in the materials you claim to have seen --

7 I take it this is over the years?

8 A. Mm-hmm.

9 Q. That's yes?

10 A. Yes.

11 Q. Yes or no here.

12 -- that dealt with the use of deadly force?

13 A. Yes.

14 Q. And what do you recall seeing from the
15 Maine -- is this the Maine criminal academy for
16 police officers?

17 A. I -- I recall that the principles that were
18 outlined in the training materials were substantially
19 similar to those principles that are taught at other
20 police academies across the country and that are
21 premised on decisions the United States Supreme Court
22 interpreting --

23 Q. That's not my question. Go ahead.

24 A. -- constitutional law.

25 Q. You should listen to my question. We're

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1 going to get through this a lot faster today.

2 Do you remember any specific principles that
3 you recall having reviewed some of the teachings of
4 the Maine Police Academy over the years with regard
5 to the use of deadly force, similar to the issues
6 that we're faced -- he was faced with in this case?

7 A. When you use the word "principle," I
8 understand that to mean a teaching precept, and so my
9 answer would remain the same.

10 Q. Well, sir, you haven't answered my question.
11 You just remember saying that -- you're saying that
12 they're consistent with the rest of the world or the
13 rest of the country.

14 I'm asking you, what -- what specific
15 principles that an officer could use on a day-to-day
16 basis when confronted with a situation similar to
17 this that you recall having reviewed somewhere over
18 the past from the Maine Police Academy?

19 A. I -- I can't cite chapter and verse of any
20 particular training document from the Maine Police
21 Academy.

22 Q. Let's continue your -- what else do you have
23 in front of you?

24 A. Transmittal letter from Donna Campbell, a
25 paralegal at Mr. Marchesi's office.

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1 Q. Okay. And then you have a -- several
2 videotapes, correct?

3 A. I have electronic media.

4 Q. Uh-huh. And what do you -- let me look at
5 that for a moment, if I may.

6 By the way, when did you receive this? Any
7 rough idea? Maybe the letter will give you a hint.

8 A. Some of that material was received
9 November 2, 2015. Some of it was received prior to
10 that.

11 Q. Have you looked at these?

12 A. Yes, sir.

13 Q. For instance, reaction versus reaction,
14 nonsurprise event.

15 Do you know what that is?

16 A. I'd have to put it in the computer and play
17 to be certain, but I believe that that is a -- a
18 video recording of something that Mr. Tucker did.

19 Q. That Mr. Tucker did? Oh, okay.

20 Have you looked at that?

21 A. Yes.

22 Q. So I'm assuming you received these at
23 various times, not all at the same time; is that
24 correct?

25 A. That is correct.

Page 20

1 Q. There's another one here that's entitled
2 "McKenney versus Melvin Tucker," video.

3 Is that the same or different than the other
4 video, if you can recall?

5 A. I believe -- I believe the content to be the
6 same. There are a couple of different videos. One
7 is played on a -- a -- a DVD player that's native to
8 an Apple system. This one, I recall, is one that
9 worked in any -- well, it works in a computer with a
10 VLC player. One of the videos had some loud music
11 playing in the background as a soundtrack and one of
12 the videos did not have music playing.

13 Q. Otherwise, were they similar?

14 A. Yes. I didn't examine the metadata, but I'm
15 assuming that no one tinkered with that.

16 Q. The -- the various cams from the cruisers,
17 Cook, Fournier, which I'm looking at, I take it
18 you've reviewed those?

19 A. Yes, sir.

20 Q. Have you ever discussed the -- those -- the
21 case with either of those officers?

22 A. I have not.

23 Q. Have you ever discussed the case with
24 Officer MacVane?

25 A. I have not.

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1 Q. Have you discussed the case with
2 Deputy Mangino?
3 A. Yes, sir.
4 Q. So you discussed not only his background and
5 training, but you discussed the -- what happened that
6 day essentially; is that correct?
7 A. Yes, sir.
8 Q. Did you -- when did you discuss it?
9 A. I believe that it was early in the summer of
10 this year.
11 Q. Okay. Did you discuss it more than once
12 with him?
13 A. No.
14 Q. When you discussed it, where were you and
15 where was he?
16 A. I do not know where he was at. I was on the
17 telephone on a phone call with Mr. Marchesi and
18 Deputy Mangino and myself, and I was in -- I believe
19 it was La Pine, Oregon.
20 Q. Okay. Tell me about the discussion.
21 A. I don't recall who initiated the call. I
22 believe it was Mr. Marchesi. He and I spoke briefly.
23 He introduced by telephone Deputy Mangino, and I
24 asked Deputy Mangino a number of questions.
25 Q. Well, that's what I want to hear, sir. I'd

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1 like to have the details of the questions and answers
2 so we can save time.
3 A. I -- I can't recall precisely the questions
4 I asked him. I asked him general questions about
5 what had happened, and I may have asked some
6 follow-up questions depending on his answers.
7 Q. Okay. Do you remember any of the questions.
8 Again, I'm not after exact words. I'm simply asking
9 the gist -- asking you for the gist of the question
10 and the gist of the answer, not of course the exact
11 words.
12 What question did you ask -- what questions
13 did you ask him, and I want specific -- I want to be
14 exhaustive about this, and what answers did he give?
15 A. I don't -- I don't --
16 MR. MARCHESI: I'm going to object to the
17 form of the question.
18 Go ahead.
19 THE WITNESS: I don't recall any -- any
20 specific questions that I asked him. I asked him
21 questions about how the events unfolded.
22 BY MR. LILLEY:
23 Q. What did he say?
24 A. I -- I don't recall his specific answers.
25 Q. Well, I'm not asking for specifics.

Page 23

1 In general, what did he say happened?
2 A. In general, what he told me happened was
3 very consistent with the reports that --
4 Q. No, no. Sir, we're going to get along a lot
5 better if you answer my questions.
6 A. Well, for the record, I don't have any
7 trouble getting along with most people, including
8 you. I'm sorry that you're distressed.
9 Q. When I -- when I say get along, we'll get
10 the deposition along, I guess. I'm not asking to be
11 your best buddy. I'm trying to get this thing over
12 with, and I would ask you to be responsive to my
13 questions when I ask for specifics. I really don't
14 want generalities. It's just going to take up a lot
15 of time.
16 A. I -- I understand. And, Mr. Lilley, you
17 interrupted me after about seven words, so you really
18 have no --
19 Q. Right, because you're not answering my
20 question.
21 A. As you have done again. You really --
22 Q. Okay.
23 A. -- have no clue what my answer is going to
24 be.
25 Q. Well, let's try to get your answer. Then I

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1 won't have to guess.
2 A. It would be more efficient if you would
3 allow me to answer --
4 Q. Sir --
5 A. -- and not, as you're doing again, interrupt
6 me.
7 Q. Sir, please answer my question.
8 A. Would you care to pose the question again?
9 Q. Yes. What questions did you ask that you
10 remember, in substance, not -- not precisely, and
11 what answers did you receive on that phone call?
12 A. I asked him questions framed about the
13 events that happened, and I don't recall any specific
14 answers that he gave me.
15 Q. How long was that telephone call?
16 A. I believe it was in the neighborhood of
17 45 minutes. It might have been as long as an hour.
18 Q. And you're saying as you sit here you don't
19 remember one question or one answer in substance that
20 he and you exchanged in that dialogue that day?
21 A. The events -- asked the question different
22 and my answer remains the same. I asked him
23 questions about what happened. I don't recall any
24 specific questions or any specific responses to
25 direct questions.

Page 25

1 Q. Well, did you ask him why he shot this man?
2 A. I may have asked that question.
3 Q. Well, what -- what did he say?
4 A. I don't recall any specific answers that he
5 gave me.
6 Q. Did you ask him about his training?
7 A. I believe that we discussed his training.
8 I'm not entirely certain.
9 Q. Did you ask him about what specific training
10 he had with regard to the use of deadly force?
11 A. I believe that we had a discussion about
12 whether he'd been to the police academy and what he
13 had been trained on there.
14 Q. Did you ask him about whether he had any
15 training on the use of deadly force by a police
16 officer?
17 A. I don't recall that specific question.
18 Q. Did you ask him why he didn't use nonlethal
19 force in this situation?
20 A. I don't believe that I did.
21 Q. Did you ask him anything about Tasers?
22 A. I may have asked him if he carried a Taser
23 and was certified in its use. I don't recall whether
24 I did or not.
25 Q. You didn't ask him questions like why didn't

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1 he consider that or did he consider that, things of
2 that nature?
3 A. I did not.
4 Q. So he simply told you what happened and you
5 asked no questions, at least no questions about that
6 in specific -- specifically that you can recall now.
7 A. I asked him questions about what had
8 happened. I may have asked follow-up questions. I
9 don't recall any of the specific questions that I
10 asked him.
11 Q. Did you tell him what you were going to do
12 for him in this case as his expert witness?
13 A. I typically have a fairly routine dialogue
14 at the beginning of such an interview or telephone
15 call. I -- I believe that I followed that dialogue
16 with him.
17 Q. What's that? What is the dialogue? What is
18 the typical routine, rather?
19 A. Well, almost always -- I think in fact in
20 every case that I can recall, the attorney is
21 participating, as Mr. Marchesi was in -- in this
22 case. Because I don't know what Mr. Marchesi may or
23 may not have explained, I simply tell Mr. Mangino and
24 other people that I have been retained by the
25 attorney representing him and that I've been retained

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1 to examine all of the documents that have been
2 provided to me and then provide opinions on the
3 police actions that were taken in a particular case.
4 I explain that I don't have any particular
5 preconceived notions and that at the end of my
6 review, I submit a report to the Court. That's
7 really -- but he's free to ask me any questions, and
8 at the end of that dialogue, I said, Do you have any
9 questions about my role and I, at some point, will
10 generally say, Mr. Mangino may interpose a clarifying
11 question or he may tell you not to answer one of my
12 questions and don't --
13 Q. Mr. --
14 A. Or, excuse me, Mr. Marchesi, and -- and
15 don't read anything into that. That's just how the
16 process works.
17 Q. And --
18 A. That's typically what I tell him, and
19 sometimes I may say, you know, you may or you may not
20 see my report.
21 Q. At that time, had you reviewed most of this
22 material before you talked to him?
23 A. I -- I had received and reviewed a
24 substantial portion. I don't think -- excuse me. I
25 don't think I could give you a percentage as to how

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1 much of the material I reviewed.
2 Q. I just said "most."
3 Did you do most of it -- did you -- had you
4 done most of the material review?
5 A. I -- I don't know. I don't think so
6 because, you know, some of the material that you've
7 already looked at this morning I received after that
8 date, so I obviously hadn't -- excuse me, had not
9 reviewed that yet.
10 Q. Did you tell him that you were going to act
11 as his expert witness in this case when you talked?
12 A. I wouldn't use that term. No, I didn't.
13 Q. Well, I want to know what you told him.
14 Are you telling me not to use the term or
15 you -- you don't want to use the term?
16 A. No, I wouldn't -- I wouldn't -- I'm sorry.
17 That's a good -- that's a good clarification.
18 I would not use that term with -- with him.
19 I wouldn't try and use any kind of a possessive
20 pronoun.
21 Q. You told him, I take it, that you're
22 reviewing the case and -- and if you found that there
23 was -- his actions were supportable or supported
24 under the law, that you would act as his expert
25 witness.

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1 Is that a fair statement?
2 A. The philosophy behind what you're -- you're
3 expressing is -- is fair. I wouldn't tell a police
4 officer that I'm her or his witness. I -- I tell
5 them I've been retained by counsel.
6 Q. Well, okay. Had -- had you told
7 Mr. Marchesi at that point that you were going to act
8 as the expert witness for Mr. Mangino?
9 A. I had agreed to -- to do services for
10 Mr. Marchesi by that point --
11 Q. So I take it --
12 A. -- yes. Sometime before that, actually.
13 Q. Right. So I take it, then, when you -- when
14 you talked to Mr. Marchesi before that indicating you
15 were going to do the services, it was going to be to
16 support Mr. Mangino's position in this shooting,
17 correct?
18 A. No.
19 Q. Well, Mr. Marchesi is not going to keep you
20 on as his expert if you're not going to be supporting
21 his position, is he, sir?
22 MR. MARCHESI: Objection to form.
23 THE WITNESS: I would expect that he
24 wouldn't, but I can't answer for him.
25 ///

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1 BY MR. LILLEY:
2 Q. At the time you talked to Mr. Marchesi,
3 which -- which predates the time you talked to
4 Mr. Mangino, am I correct?
5 A. Yes.
6 Q. Had you reviewed enough information that you
7 were confident that you could support their position
8 in this lawsuit?
9 A. Based on the information that I had
10 received, by the time I spoke to Deputy Mangino and
11 Mr. Marchesi in that phone call, I had not yet
12 written my report, but I had formed preliminary
13 conclusions that are expressed in my report. They
14 didn't -- they didn't change.
15 Q. So you did -- you did conclude that you
16 could support their position on the information you
17 had, but you still needed to finalize that in a
18 report, maybe perhaps more specific.
19 A. I -- I'm -- I'm not --
20 Q. Is that a fair summary?
21 A. It is, although I'm not sure ultimately what
22 position I'll take legally, but my --
23 Q. Well, what --
24 A. -- conclusions didn't change.
25 Q. I -- I didn't hear the last part.

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1 A. Well, when you -- when you say to me the
2 position, I -- I'm hearing in that phrase, you know,
3 what the legal theory and argument will be.
4 I don't know ultimately what that will be,
5 but I had seen enough documents to form some
6 preliminary conclusions and opinions. And those
7 preliminary conclusions and opinions did not change
8 and they're reflected in my report.
9 Q. Let me be more specific, then.
10 You had formed the opinion that Mr. Mangino,
11 from what you had prior to talking to him, was
12 justified in shooting Mr. McKenney; is that correct?
13 A. Yes.
14 Q. Now, when you say you told him that you
15 would be writing a report, "him" meaning Mangino,
16 and -- and -- and sending it to the Court, did you do
17 that?
18 A. I -- I don't believe I said sending it to
19 the Court. It goes to the Court, but I don't send
20 it. That ultimately is Mr. Marchesi's role.
21 Q. So Mr. Marchesi, you -- it's your
22 understanding, sends your report to the Court?
23 A. Ultimately, if he uses my report.
24 Q. Okay. All right. Where were we in our
25 inventory here?

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1 A. So for purposes --
2 Q. I'm going to look this over a little bit
3 later. I don't want to take the time now, if I can,
4 so if you could keep it around, just describe, if you
5 will, what you have with you.
6 A. Okay.
7 THE WITNESS: Mr. Videographer, I just
8 knocked on my microphone. I think I'm putting it
9 back in the same place.
10 Is that acceptable to you?
11 VIDEOGRAPHER: (Thumbs up.)
12 THE WITNESS: Thank you.
13 BY MR. LILLEY:
14 Q. You're now looking at one -- one of two blue
15 binders.
16 A. Correct.
17 Q. Thank you.
18 If you'll describe what that is, first of
19 all, or does it --
20 A. Okay. The first -- the first document is
21 a -- I believe the -- the term is rough copy of a --
22 or a -- an uncorrected copy of a deposition that was
23 taken on November 2nd of Melvin Tucker.
24 Q. Okay.
25 A. That -- so this document will actually

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1 appear also in that other folder, although in the
2 other folder, it's on electronic media.
3 Q. Now, let me stop you, if I may. Go ahead
4 and finish what you're doing to -- to organize.
5 A. Okay.
6 Q. You read Mr. Tucker's deposition.
7 A. Yes.
8 Q. And you also saw his video, correct?
9 A. I -- I've seen two versions of the video.
10 Only distinction being that one had music and --
11 Q. Okay.
12 A. -- but yes, I've seen -- I've seen the
13 video.
14 Q. They're substantively the same, just one of
15 them has a musical introduction, as I recall; is that
16 correct?
17 A. I think it has music playing through the
18 whole thing. It's distracting.
19 Q. You can listen to the other one, sir, when
20 it comes to court time.
21 A. Right.
22 Q. I'll -- I'll -- I'll assure you.
23 MR. MARCHESI: Objection.
24 BY MR. LILLEY:
25 Q. With regard to -- when you reviewed

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1 Mr. Tucker's deposition, I take it you did it with a
2 critical eye, did you not?
3 MR. MARCHESI: Objection to form.
4 BY MR. LILLEY:
5 Q. Do you know what I mean by that?
6 A. I -- when -- when you talk about "critical
7 eye," I'm thinking applying -- of one who would apply
8 critical thinking skills and -- and you would be
9 correct.
10 Q. So when you went through it, did you make
11 notes or make notes on a separate pad or on the --
12 the document itself?
13 A. I did not.
14 Q. You don't customarily do that?
15 A. I -- I don't have a pen and -- for a number
16 of reasons, I don't write much.
17 Q. Okay. So any criticisms, critiques,
18 comments that you believe should be made on his
19 report, how do you preserve it so that you can
20 reference it later?
21 A. Memory.
22 Q. Okay. So just simply by memory.
23 A. Well, I have the -- the benefit of having
24 his report --
25 Q. Right.

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1 A. -- and -- or his deposition and -- and his
2 report and video in a couple different formats, so I
3 keep those with me. And if this case should proceed
4 to trial, it's fairly likely I would look at his
5 deposition before trial.
6 Q. Of course. But what you had earlier found
7 to be perhaps questionable or at least that you
8 didn't agree with, those kinds of things, those would
9 be lost, I guess, to the -- to history because there
10 wouldn't be any record of them.
11 Do you agree with that?
12 MR. MARCHESI: Objection to form.
13 THE WITNESS: I -- they're not memorialized
14 in handwriting.
15 BY MR. LILLEY:
16 Q. Okay. What else do you have there, sir?
17 A. This is a transmittal letter, again, from
18 Donna Campbell that transmits the file of Mr. Tucker.
19 And then there is what has been represented by me to
20 be the file of Mr. Tucker.
21 So do you want me to go through that
22 individually?
23 Q. Well, no, you -- I don't think so.
24 That's -- when you say "file," these -- these are the
25 documents that he produced at deposition?

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1 A. That's -- my understanding is that -- should
2 have thought before I printed it.
3 Yes. So he has some of the same documents
4 actually --
5 Q. Okay. I don't need --
6 A. -- that I have.
7 Q. I probably don't need to look at those.
8 I -- I've looked at those, I believe.
9 A. It's my understanding that you produced this
10 set of documents entirely in the recent past.
11 Q. And, again, same question: When you went
12 through the documents in addition to the report, the
13 documents would include whatever he had in his file
14 together with his deposition.
15 Did you make any notes, dictate any
16 memoranda, in any way memorialize any of your
17 thinking when you reviewed his materials?
18 A. No.
19 Q. Okay. Then you'll do that from memory, too,
20 I guess, if you're called upon to do it again; is
21 that correct?
22 A. It's even more likely that I would review
23 those materials before court.
24 The next --
25 Q. Well, but you'll do it from memory of

1 whatever you might have found in the past --
2 A. Yes.
3 Q. -- rather than -- okay.
4 A. Correct.
5 Q. Than memorialized. Okay. Thank you. Go
6 ahead.
7 A. The next set of documents is in a tab
8 that -- that says "Complaint and Pleadings," and so
9 that's really what it is.
10 And then there's a rather slender -- so it's
11 removal and complaint and those sorts of things.
12 Then there's a slender stack here that's
13 correspondence, and this appears to be correspondence
14 between your office, you, and Mr. Tucker.
15 Q. Okay. Now -- yeah, go ahead. And what is
16 the next inventory?
17 A. So next we have a stack of -- where is my
18 pink -- there we go.
19 The -- you didn't ask. The pink sheets are
20 just to keep families of documents separated.
21 Q. I understand.
22 A. So next we have a stack of policies or
23 they're titled "Standard Operating Procedures" of the
24 Cumberland County Sheriff's Office. There are five
25 of them, I believe.

1 Q. May I see those?
2 A. Yes, sir. (Holding document to Mr. Lilley.)
3 Q. Now, with regard to these, these Standard
4 Operating Procedures, as you say, from the Cumberland
5 County Sheriff's Office, did you ever determine
6 whether or not Mr. Mangino had ever read these?
7 A. I didn't ask him. I can only presume, but I
8 don't have any certain knowledge.
9 Q. Did you determine it in any way?
10 A. No.
11 Q. When you talked to him -- and I know that
12 it's very vague. In fact, I think you have very
13 little memory, but perhaps this might jog your
14 memory.
15 When you talked to him on the telephone,
16 after you had -- strike that.
17 Had you reviewed these procedures before you
18 talked to him on the telephone?
19 MR. MARCHESI: Objection to form.
20 THE WITNESS: I -- I had. I didn't have
21 them with me, but I had seen them before.
22 BY MR. LILLEY:
23 Q. But you would -- you do this from memory.
24 You don't take notes. Whatever that's in here, you
25 know what's in here from your memory.

1 A. That's generally correct.
2 Q. So when you talked to him on the phone, did
3 you -- did you -- do you remember whether you asked
4 him about any of these procedures?
5 A. I -- I didn't ask him about any of the
6 policies.
7 Q. Or procedures? About the procedures --
8 A. No.
9 Q. Wasn't that an important part of your
10 analysis to determine whether or not this officer
11 followed Cumberland County Sheriff's Office standard
12 operating procedures?
13 A. Whether he followed policies and procedures
14 of the office was certainly a consideration.
15 Q. And you never determined whether he did?
16 A. I didn't ask him about the policies and
17 procedures.
18 Q. Did you use any policy and procedure in
19 particular of the five that you've handed me in
20 analyzing the -- the propriety of the shooting that
21 day?
22 A. May I see them again?
23 Q. Sure. (Holding documents to witness.)
24 A. I certainly looked at -- I certainly looked
25 at all of the policies.

1 One of them -- yeah. So there's one titled
2 "Use of Force."
3 Q. Okay. Could I look at that?
4 And I take it --
5 A. Yes.
6 Q. -- you memorized it or you --
7 A. Yes, you --
8 MR. MARCHESI: Objection. I object to the
9 editorial comment from counsel.
10 THE WITNESS: You're -- you're incorrect,
11 but you're certainly welcome to look it.
12 BY MR. LILLEY:
13 Q. No, I -- I said I take it you've either
14 memorized it or looked it over. I didn't get to
15 finish my question.
16 A. I -- I have. I have looked it over
17 recently.
18 Q. Okay. But as we sit here, you don't know
19 whether or not Mr. Mangino has even read this
20 document; is that correct?
21 A. I can't recall whether I have any
22 information on that point or not, sir. So I don't
23 know as we sit here today.
24 Q. Well, I mean, did you ever go through it and
25 say, well, now, look, let's look at Section 2 or

1 Section E or things of that nature with him?
2 A. I -- I did not.
3 Q. Did you ever ask him if he understood the
4 term "imminent"?
5 A. I did not.
6 Q. Or "immediate"?
7 A. No.
8 Q. At any time?
9 A. No.
10 Q. Okay. I think I have these, so I'm not
11 going to waste time on this. Thank you.
12 A. Thanks.
13 So the next stack, I -- and I don't have a
14 divider page. Oh, there we go. Here it is. I
15 didn't -- I thought there was one more in here.
16 So this next stack, which is rather large,
17 is the copy of the internal affairs investigation.
18 So this document, I reviewed this document. This
19 document actually contains duplicates of a number of
20 other documents that you've already looked at and --
21 Q. Yes.
22 A. -- and others that I think you'll see here
23 in a few moments.
24 Q. Did you -- did you participate at all in the
25 investigation for the Cumberland County or the

1 Windham Police Department?
2 A. I did not.
3 Q. Did they talk to you -- "they" meaning
4 investigators for the internal affairs of the
5 Cumberland County and -- with regard to this case,
6 did they talk to you at all or have you ever talked
7 to them at all?
8 A. I have not.
9 Q. And likewise, same question with Windham
10 Police Department?
11 A. I have not. To my knowledge, I've not
12 spoken with any of the officers other than
13 Deputy Mangino.
14 Q. Okay. I think I know what this is about, so
15 let me give this back to you and you can put it in
16 your order.
17 A. Thanks.
18 So now the next stack of documents is a
19 series of transcripts of emergency dispatch calls,
20 911 calls, and some interviews of law enforcement
21 persons, and then there's transcripts of just various
22 related phone calls that went into the communications
23 center and were recorded by the police dispatch
24 center.
25 Q. May I look at those, please?

1 A. Sure. (Handing documents to Mr. Lilley.)
2 Q. All right. And I take it your answer --
3 well, let me ask the question. Withdraw the
4 beginning of that last question.
5 I take it you have not talked to any
6 dispatchers or nonpolice officers involved in this
7 matter; is that correct? And -- and I say "this
8 matter." The case as it unfolded back in
9 April 12th of 2014.
10 A. I -- I have not, except obviously I've --
11 I've spoken to Mr. Mangino, that's --
12 Q. Right. Well, let's finish our inventory.
13 Let me stop you just for moment, however,
14 and digress while I think of it.
15 You've been retained by Mr. Mangino's
16 attorney, correct?
17 A. I've -- I've been retained by Mr. Marchesi.
18 I -- I think his client is the county. I don't know.
19 Q. Okay. Well, you've been retained by
20 Mr. Marchesi, then?
21 A. Yes.
22 Q. For the county of -- Cumberland County in --
23 in Maine. I'm not trying to get technical --
24 A. Sure. I don't know that it matters. I --
25 I -- whether it -- in some cases the county is a

1 distinct entity from the sheriff. I don't know who
2 his ultimate client is. I believe it is the
3 Cumberland County Sheriff.
4 Q. You don't know who you're working for, but
5 you're getting paid by one of them, correct?
6 A. I'm getting -- I've been retained by
7 Mr. Marchesi. I don't know who he would title his
8 client as being.
9 Q. Okay. Do you -- are you also -- strike
10 that.
11 Have you been retained or asked to review in
12 any way the conduct of the Windham Police
13 Department's officers in this matter?
14 A. No.
15 Q. Have you ever talked to this gentleman here,
16 Ed Benjamin?
17 A. Yes, sir.
18 Q. When?
19 A. This morning, maybe ten minutes prior to
20 your arrival.
21 Q. About this case?
22 A. No.
23 Q. Have you ever talked to him at any other
24 time?
25 A. I don't believe so. I don't believe I've

1 ever met him before.

2 Q. Do you plan on, with regard to your
3 retain -- retention in any discussions you may have
4 had with Mr. Marchesi, to offer opinions with regard
5 to the propriety or impropriety of conduct by the
6 Windham Police Department officers?

7 A. I've not been asked to do that to date.

8 Q. Have you done it?

9 A. No.

10 Q. Have you made conclusions or critiques or
11 analysis of their conduct in this case with regard to
12 whether they comported with the law?

13 MR. MARCHESI: I'm going to object and
14 instruct the witness not to answer to the extent that
15 any conclusions he reached are outside of the scope
16 of the expert witness designation --

17 MR. LILLEY: Well, that's what I'm asking.

18 If you --

19 BY MR. LILLEY:

20 Q. My question is, have you made any
21 conclusions or are you going to offer any opinions
22 with regard to the -- the Windham Police Department's
23 conduct in this case?

24 MR. BENJAMIN: Well, I'll object.

25 MR. MARCHESI: So you can answer the

1 question to the extent that it asks you to disclose
2 any conclusions you've reached, critiques you've
3 made, et cetera, that you expect to offer in this
4 case. And I would distinguish that from any
5 conclusions you've reached or critiques you've made
6 on your own as part of your review that you do not
7 expect -- you have not been asked to offer in this
8 case.

9 And to that extent, I would instruct the
10 witness not to answer.

11 MR. LILLEY: That's -- that's inappropriate
12 to instruct him not to answer. But we can take that
13 up later.

14 BY MR. LILLEY:

15 Q. So let's look into this a minute so we don't
16 have to do this again.

17 With regard to the -- the events that
18 unfolded on the -- April 12th of 2014 leading to the
19 death of Mr. McKenney, have you made any conclusions
20 or any determinations of the propriety or impropriety
21 of the acts of the officers of the Windham Police
22 Department? That's a simple yes or no.

23 A. In -- the way the question is posed, I think
24 the answer is no.

25 Q. And so I take it, then, the -- the question

1 now, then -- the second question is maybe obvious,
2 but that you don't intend, unless somebody raises the
3 issue at trial or the judge -- and the judge permits
4 it, to offer any opinions as an expert witness about
5 the propriety or impropriety or the acts of the
6 Windham police officers; is that fair to say?

7 A. That is a fair statement, sir.

8 Q. Okay. Let's look at the next blue folder,
9 if we can.

10 A. The first document is a -- a copy of my
11 report.

12 Q. Okay. And let me stop you for a moment, if
13 I can, so we don't have to come back.

14 A. Okay.

15 Q. The -- what was your intent in writing this
16 report? That's a broad -- broad question. Meant to
17 be.

18 A. To provide a report that is consistent with
19 Rule 26 of the Federal Rules of Civil Procedure for
20 purposes of Mr. Marchesi in defending the matter in
21 litigation.

22 Q. And you expected -- it says the United
23 States District Court for the District of Maine.

24 This is a report that you prepared in its
25 entirety?

1 A. Yes. I didn't look through it, but I --
2 it's out of my file. I'm pretty sure that's all
3 that's in there.

4 Q. I'm not saying you did the typing, but have
5 you prepared it on -- through the auspices of your
6 office, correct?

7 A. I would have dictated it and --

8 Q. Okay.

9 A. -- and made corrections to it, but it's my
10 work and my work alone.

11 Q. And -- yeah. So it's done internally in
12 your office or whatever you have for a facility.

13 A. Yes.

14 Q. And it's signed by you.

15 A. Yes.

16 Q. Okay. Thank you.

17 A. Next, there's a transmittal letter from --
18 this is actually a letter from Mr. Marchesi to me,
19 dated May 22 of 2015, and it's a cover document, or a
20 transmittal document for a number of these pages that
21 follow.

22 Q. All right. So we can go down to the next
23 colored page.

24 Is that -- is that where you're going next?

25 A. I'm not sure if I got this from -- at that

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1 time or not, but at some point, I was given then this
2 confidentially -- confidentiality agreement.

3 Q. Well, let me just get this here.

4 A. Okay.

5 Q. Let me look at this for a moment. Okay.
6 We've got the report. I'm sorry. That's already
7 been taken care of.

8 A. Right.

9 Q. Conclusion. I'm going to need a copy of
10 this. I don't believe I have a copy of this.

11 But let me ask you, and for this so we all
12 are talking about the same thing, this is a May 22,
13 2015, letter that was written to you by Peter
14 Marchesi. And it talks about a pleasure speaking
15 with you recently. This is in May of 2015.

16 Going back to your memory, is this prior to
17 your call with Deputy Mangino?

18 A. Yes.

19 Q. And I take it that -- it says, "It was a
20 pleasure speaking with you regarding the above
21 referenced matter."

22 I take it at that point you had agreed to
23 review documents, is that right, No. 1?

24 A. I -- I had.

25 Q. And had you reviewed any at that point?

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1 A. I had not.

2 Q. Had you -- but you had discussed the fact
3 pattern, I take it, with Mr. Marchesi.

4 A. I had a -- a conversation with Mr. Marchesi
5 and he gave me the general facts, yes.

6 Q. And as a result of giving you the general
7 facts, did you tell him that you thought you could
8 support the case, depending on what the documents,
9 follow-up documents showed?

10 A. No.

11 Q. Did you -- did you tell him about your
12 previous experiences as a expert witness?

13 A. I did not.

14 Q. Do you know how he came to select you as an
15 expert? Of course, he didn't have to tell you, I
16 guess.

17 A. He -- he did not. And I don't know.

18 Q. Did you tell him that you only testified for
19 police officers on their behalf or police
20 departments?

21 A. No.

22 Q. Is that a fact?

23 A. At the present moment, it is.

24 Q. Well, you say "the present moment."

25 It's been that way for years, hasn't it?

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1 A. No.

2 Q. No?

3 A. (Shakes head.)

4 Q. When's the last time you testified for a
5 plaintiff who sued a police officer for a wrongful
6 death?

7 A. I'd have to look through my files, but it's
8 been more than four years.

9 Q. And how many times have you testified for
10 plaintiffs who have sued police departments or police
11 officers for wrongful death? More than that one?

12 A. Yeah, I -- I -- yes, I'd have to look at my
13 employment records because that's how I can make the
14 tie.

15 Q. Do you have any that come to mind now from
16 your memory?

17 A. Sure.

18 Q. Other than that one?

19 A. Where a death -- where the person actually
20 died?

21 Q. Where the person was killed, as in this
22 case, by a police officer.

23 A. No.

24 Q. Was there one? Or even one?

25 A. No. The cases where I've worked on behalf

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1 of a plaintiff, I believe that are in my memory, I
2 believe they all ultimately survived.

3 Q. That the plaintiffs survived.

4 A. Yes.

5 Q. And those are nondeadly force cases, are
6 they not? They were cases involving dogs?

7 A. Insofar the definition of -- death did not
8 result in any of those cases.

9 Q. Okay. What I'm trying to do is distinguish
10 between deadly force cases and nondeadly force cases.

11 Nondeadly force cases, I -- example, for me
12 at least, as a civilian here, would be a case
13 involving perhaps a -- a -- a dog that had attacked
14 somebody, the use of a Taser, the use of other
15 nonlethal weapons.

16 You've testified in those kind of cases,
17 have you not?

18 A. Correct. None of those -- none of the cases
19 on -- where I've testified on behalf of a plaintiff
20 or a person aggrieved by an officer's conduct before
21 an administrative tribunal, none of those cases have
22 involved shootings.

23 Q. And why is it that you haven't testified on
24 behalf of a plaintiff for the last four years?

25 A. Contractual obligations.

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1 Q. What do you mean by that?
2 A. I -- I recently transitioned my full-time
3 employment, but for more than four years, I don't
4 recall exactly how many. I have worked either full
5 time or part time for a company that employs -- maybe
6 a third of its workforce is comprised of either
7 active or retired law enforcement persons, and that
8 company has a policy that prohibits its employees
9 from performing expert witness work on behalf of
10 plaintiffs suing police departments, sheriffs'
11 offices, and so forth.
12 Q. What's the name of that company?
13 A. Lexipol.
14 Q. Do you have a copy of that contract?
15 A. I do not.
16 Q. You don't have a copy of the contract you
17 signed?
18 A. I -- I have a copy of my employment
19 contract.
20 Q. Does it say it in the employment contract?
21 A. It's not contained in the employment
22 contract.
23 Q. Well, if it's not in the employment
24 contract, how -- how could it be binding? You're an
25 attorney, aren't you?

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1 A. Yes. How could it be binding --
2 Q. Yeah, I mean, if it's not in your employment
3 contract as -- as to the -- the specifics of your
4 employment and prohibition against any kind of action
5 or employment, it should be in your employment
6 contract, shouldn't it?
7 A. Not necessarily.
8 Q. Well, what -- what form does it take that
9 you don't have?
10 A. I have been instructed orally as a condition
11 of my employment. There's also a nondisclosure and a
12 nonharm to client provision in a separate document
13 that's not part of my employment contract.
14 Q. Let me see if I get this right.
15 So you're not supposed to disclose what you
16 just disclosed; is that right?
17 A. No.
18 Q. That's not right or --
19 A. That's not right.
20 Q. Tell me what that means, then. I -- I guess
21 I'm ...
22 A. Well, I -- I certainly don't want to school
23 you in the law, but it seems to be that's what you're
24 asking.
25 I -- in -- I don't know about Maine. I

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1 think that's a collective bargaining state. This is
2 not. An oral contract, even an oral employment
3 contract, is binding in this state.
4 So I have very strict oral instructions from
5 that employer to not serve as an expert witness or a
6 consultant on a plaintiff's case.
7 Q. Why --
8 A. On --
9 Q. Go ahead.
10 A. Additionally, we have a written document in
11 the company that I don't remember the exact title,
12 but it's a nondisclosure, noncompetitive agreement
13 that also says we won't do anything that is -- I
14 don't remember exactly the words. I think it says
15 inimical to the interests of our clients or potential
16 clients which are law enforcement agencies.
17 Q. So it would be inimical to your potential
18 clients to testify in a case for a plaintiff per se,
19 correct?
20 A. I don't know. I know that I've been
21 instructed per se to not do that.
22 Q. Well, we do have a -- binding contracts too.
23 But if there's an employment contract in our state,
24 and I believe in yours, the terms of that employment
25 contract, including any restrictions, are usually

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1 contained within that employment agreement.
2 Do you agree with that?
3 A. No.
4 Q. In any event, it's not in yours, correct?
5 A. Correct.
6 Q. And who's the person that told you this?
7 A. Ron Wilkerson.
8 Q. And what's his position?
9 A. I don't know what he's doing right now.
10 At the time, he was the chief executive
11 officer of the company.
12 Q. And the company, again, is named Lexipro?
13 A. Lexipol, L-e-x-i-p-o-l.
14 Q. And what does it -- what -- what does it do?
15 A. Lexipol provides risk management services
16 and primarily operational policy manuals for law
17 enforcement agencies, custody facilities, and fire
18 services.
19 Q. And risk management in the usual parlance,
20 at least in the insurance industry, is how to prevent
21 or reduce the possibility of getting sued for
22 liability, correct?
23 MR. MARCHESI: Objection to form.
24 THE WITNESS: That -- that's certainly a
25 major component of risk management.

1 BY MR. LILLEY:

2 Q. So how long was that contract good for
3 restricting you from testifying for both sides?
4 A. I don't know. I've never really considered
5 the possibility of reaching it, but I'm confident
6 that it endures as long as my employment endures and
7 they continue to pay me.

8 Q. Are you still employed by them?

9 A. Yes.

10 Q. And your job there is?

11 A. I am the senior legal advisor, and my job is
12 primarily to consult on the development of use of
13 force policies, as well as to speak to groups such as
14 insurance pools, risk management associations, gee,
15 so police associations, those sorts of professional
16 groups and explain the services offered by Lexipol.

17 Q. And you also speak to police officer groups?
18 Or more just chiefs?

19 A. More to -- more to administrative groups,
20 but I certainly -- you know, certainly from time to
21 time, not necessarily in the capacity of working for
22 Lexipol, but I have spoken to -- to police groups.

23 Q. So how did you obtain this joint defense
24 privilege confidentiality agreement signed by both --
25 both attorneys here, Mr. Benjamin and Mr. Marchesi?

1 Who gave it to you?

2 A. I believe that it was sent to me in the mail
3 by Donna Campbell, Mr. Marchesi's paralegal.

4 Q. And this is -- you understand what a joint
5 defense agreement is, I assume?

6 A. I do.

7 Q. And is it -- it's an agreement as it states
8 in the first paragraph, Undersigned counsel believes
9 that there is a mutuality of interest in a common,
10 albeit separate, defense of the respective clients
11 with regard to the proceeding.

12 I'm reading from that. Did I get that
13 right? I didn't get a copy. That's under 1.

14 A. Yes.

15 Q. So I'll need copies of these two. Let me
16 put these out. I'll give these back to you. I think
17 we can get the service here to do that today.

18 Now, where are we in our inventory here?

19 A. I -- I believe that I had been speaking
20 about transcripts.

21 Q. Okay.

22 A. And then I think we stopped to talk about
23 that.

24 Q. Yes.

25 A. So -- so I -- I believe I've described this,

1 but this is a collection of miscellaneous phone
2 transcripts including -- well, there's phone
3 transcripts and I think -- I think that there are
4 live interview transcripts there.

5 Q. Okay. And this is not familiar either.

6 MR. LILLEY: I will need this copied too.

7 MR. MARCHESI: Let me see what this is
8 before we incur the expense. Now, this is all from
9 the attorney general's office. You have all this
10 stuff.

11 MR. LILLEY: I don't have that version.

12 MR. MARCHESI: Well, you -- you should
13 have --

14 MR. LILLEY: I'm going to get copies of
15 that, and I'm paying for it.

16 MR. MARCHESI: Okay.

17 MR. LILLEY: This is my deposition.

18 MR. MARCHESI: If you don't mind paying for
19 it, that's fine.

20 MR. LILLEY: Of course I don't.

21 BY MR. LILLEY:

22 Q. What do you have there next? So I'm going
23 to get these copied. Let's try to -- I'm going to
24 put these over here, but I'll give them back to you
25 as soon as possible. I believe we can get them

1 copied today.

2 MR. MARCHESI: Ken, if there's a way that
3 you'd like to --

4 THE WITNESS: I've turned this sideways so
5 I'll know --

6 MR. MARCHESI: Okay.

7 BY MR. LILLEY:

8 Q. Okay.

9 A. Honestly, the way I do my files, sir,
10 there's no great order other than I try to --

11 Q. Okay. Good.

12 A. -- keep families of documents together.

13 Q. So what do you have there next?

14 A. Next is a -- a letter to you from Joseph
15 Thornton, a private investigator --

16 Q. Okay.

17 A. -- and some materials that he provided --

18 Q. All right. I know what that is.

19 A. -- to you.

20 Q. Yeah. Okay. Keep going.

21 A. Next is an email relating to --

22 Q. I'll put that -- I'll put that right there,
23 so you can --

24 A. -- an email relating to the mobile
25 audio/video system in use.

1 Q. Okay. Okay.
2 A. I think I got that out of order.
3 Q. I don't have that either, so I'll put that
4 over here on the -- on the pile.
5 For the record, that's an email from Ed
6 Benjamin to P. Bare (phonetic), May 6, 2015.
7 What else do you have?
8 A. The next is a Court filing, the initial
9 disclosures of Defendants Nicholas Mangino and
10 Cumberland County Sheriff's Office. There are a
11 number -- a number of attachments in that.
12 Q. Let me see here. Oh, yes, okay.
13 Have you talked to any of the other
14 potential witnesses in this case?
15 A. I don't --
16 Q. You probably don't know who they are.
17 A. Right. I don't believe that I have.
18 Q. Let me try that again because, I'm sorry,
19 you --
20 Have you talked to Mr. Gohn (phonetic), I
21 think he pronounces it?
22 A. No.
23 Q. He's been designated as an expert witness in
24 addition to you.
25 A. No.

1 Q. Have you read his report?
2 A. That name doesn't ring a bell, so I don't
3 believe so.
4 Q. Okay. That's what I'm familiar with.
5 A. The next stack is Defendant Nicholas Mangino
6 and Cumberland County office answer to plaintiff's
7 first set of interrogatories. This may well be a
8 duplicate. I don't know.
9 Q. Okay. Let me just look at it. (Counsel
10 reviewing document.)
11 Yeah, I think I have that too. I'll give
12 that -- hand that back to you.
13 A. Next we have the Defendant Windham Police
14 Department's Responses to Plaintiff's First Set of
15 Interrogatories with a variety of attachments to the
16 interrogatories.
17 Q. Did you read that?
18 A. Yes, sir.
19 Q. So you are reading information as it relates
20 specifically to the Windham Police Department,
21 correct?
22 A. I read that document at some point.
23 Q. Is that a yes?
24 A. Insofar as that relates to the Windham
25 Police Department, that's a yes.

1 Q. Thank you. Okay.
2 A. And then the last stack here is the Notice
3 of Claim, and I believe that there is a complaint.
4 I -- I didn't look through. There may be an answer
5 as well, but that's just -- those are court -- court
6 pleadings.
7 Q. This one is called a Notice of Claim
8 pursuant to the Maine Tort Claims Act?
9 A. Yes.
10 Q. And other such pleadings. The answers are
11 contained within this group, and a Consent to
12 Removal, correct?
13 A. Well, I didn't remember the Consent to
14 Removal, but I'm -- I'm sure -- sure it's there.
15 Q. Did you -- did you read the attorney
16 general's investigation in this case?
17 A. I -- I read the report that appeared to
18 originate from the attorney general, so I believe
19 that that's the document you're referring to.
20 Q. That's -- did we -- did we look at that?
21 Because I didn't notice.
22 A. It's in I think that stack there.
23 Q. Okay.
24 A. It's the one that has a lot of -- I said it
25 was about that thick.

1 Q. Right.
2 A. And it has a lot of duplication. And, in
3 fact, this file has some duplication as well.
4 Q. For the record, it's about 2 inches thick,
5 correct?
6 A. Thereabouts.
7 Q. And did you have any criticisms of the
8 attorney general investigations or any errors listed
9 of the criticisms?
10 A. Nothing that -- nothing that comes to mind
11 that jumps up that I would characterize as -- as a
12 criticism.
13 Q. You wouldn't have taken notes on that
14 either, given your custom and practice, correct?
15 A. Correct.
16 Q. And did you, in your reviewing of the facts
17 of the case from whatever source, find that any of
18 the facts that they concluded in their report were
19 erroneous?
20 A. I don't recall reaching the conclusion of
21 any -- that they -- that they had reached any
22 erroneous facts.
23 Q. And I think I just asked the question.
24 Forgive me if I'm repeating myself.
25 Their conclusions were not erroneous in your

1 view?
2 A. I don't believe so.
3 Q. You don't believe that they're erroneous.
4 A. Correct.
5 Q. Okay. Now, your own report, have you -- I
6 noticed -- strike that. Let me start over again.
7 In your report, as in many that we see from
8 experts, including our own, you reserve the right to
9 make corrections, changes, modifications depending on
10 subsequent information you may receive, correct?
11 A. I -- I typically write that, so I'm pretty
12 sure I did in this case.
13 Q. Okay. Have you in fact made any subsequent
14 changes, modifications to the report that we just
15 looked at that was provided to the Court?
16 A. I have not. And, Mr. Lilley, when you are
17 at an appropriate time, I'm fairly confident the
18 videographer will give you about 80-minute high sign
19 here pretty quickly.
20 MR. LILLEY: You want to take a break, sir?
21 VIDEOGRAPHER: You've got ten minutes
22 remaining.
23 THE WITNESS: Well, if you're going to go
24 somewhere in ten minutes, that's fine.
25 //

1 BY MR. LILLEY:
2 Q. Well, I --
3 A. If not, let's take a break now.
4 Q. Well, I -- I was just going -- let me finish
5 this up, and I'll take ten minutes.
6 A. That would be fine.
7 Q. Have you received anything such as
8 depositions that have come out since your report that
9 alters or in any way modifies your findings?
10 A. No.
11 Q. Have you seen any photographs or any kind of
12 material at all that you believe in any way changes
13 your position, even to the slightest degree?
14 A. No.
15 Q. Have you been asked by anybody, anybody in
16 this room other than me, to review your report or
17 update it in any fashion?
18 A. No.
19 Q. Do you intend to do that?
20 A. Not based on what I've seen subsequent to
21 filing that report. But, again, I --
22 Q. Okay.
23 A. -- I can't -- I suspect that there will --
24 I -- I believe that you have other depositions to
25 take. I -- I -- I don't know. I don't really talk

1 about strategy, but there may be other depositions.
2 There may be other things that come to mind. If I
3 see those, they may change my views.
4 Q. Well, you've been furnished Mr. Mangino's
5 partial deposition, correct?
6 A. I've seen a deposition. I -- whether it was
7 a rough or not, I don't know.
8 Q. Well, no, I'm not saying rough. We didn't
9 finish the deposition. I'll leave it at that.
10 A. Okay.
11 Q. So he has a couple more hours to go.
12 But you have seen a good portion, I'm going
13 to submit to you, of his deposition, have you not?
14 A. Yes.
15 Q. And has that --
16 A. To --
17 Q. Go ahead. I'm sorry.
18 A. To -- to be clear, whether it's finished or
19 not, I've seen the document that -- that -- in its
20 entirety.
21 So when you say a portion, I want it to be
22 clear I've read the entire -- I -- I don't need to
23 continue reading what I have yet.
24 Does that make that clear?
25 Q. Well, you don't know if -- if you need to if
1 you haven't read it.
2 A. Well, I don't -- I don't know if there's
3 something to come in the future. If there is, fine.
4 But what -- what has been taken in deposition now
5 I've had and I reviewed.
6 Q. And that hasn't changed your opinion
7 whatsoever.
8 A. No.
9 Q. And you have -- I -- I -- have -- have you
10 seen the deposition of MacVane? I'm not sure you
11 have, but I think you did.
12 A. I have three copies. I don't know how that
13 happened, but yes.
14 Q. Did you read it?
15 A. Yes.
16 Q. And did that in any way change any of your
17 opinions?
18 A. Did not.
19 MR. LILLEY: With that, I think we can take
20 a break?
21 THE WITNESS: Thank you, sir.
22 VIDEOGRAPHER: This marks the end of Tape 1.
23 The time is 10:27. We're off the record.
24 (Short recess taken.)
25 VIDEOGRAPHER: This is Videotape No. 2 in

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1 the deposition of Kenneth Wallentine. The time is
2 10:42. We're back on the record.

3 BY MR. LILLEY:

4 Q. Let me turn to your background. Would
5 you -- I have your CV, and I don't want to go through
6 it all, but I do want to go through some of the
7 background that you have.

8 How long have you been -- let me start by
9 saying how long have you been in law enforcement,
10 going back to the beginning?

11 A. 1979.

12 Q. Okay. And you started as what?

13 A. I started as a -- as a cadet at the BYU
14 Police Department in 1979.

15 Q. The what -- the police department?

16 A. BYU, Brigham Young University.

17 Q. Okay. And you became a police officer when?

18 A. 1982.

19 Q. And what force?

20 A. Provo Police Department. Provo.

21 Q. Yeah, you'll -- you'll have to give me the
22 full --

23 A. Provo Police Department.

24 Q. Provo. And what's that? Is that a town?

25 A. That's a city here in Utah.

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1 Q. Okay. I'm not familiar with this area, as I
2 told you, this is my first trip to Utah, so --

3 A. It's --

4 Q. -- just give me the added -- added
5 information, please.

6 A. It's a city just south of here. Largest
7 city in the next county --

8 Q. Okay.

9 A. -- so ...

10 Q. And tell me, I don't want to go through
11 every -- every -- every -- because I have it in here
12 to -- to a degree, but I'd like to -- you -- you've
13 worked for the -- are these municipalities,
14 essentially? We call them municipalities. You call
15 them towns, I guess.

16 You've worked as a police officer, correct?

17 A. I've worked at different levels. A number
18 of years, I worked for a municipal police agency.

19 Q. Okay. And did you become a chief of police
20 in any agency?

21 A. Yes.

22 Q. Can you give me those offhand.

23 A. From 2005 until my retirement -- well,
24 retirement being in the context of a legal term, not
25 practical term, in 2014, I was the chief at the Utah

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1 Attorney General Investigation Division.

2 Q. Is that -- okay. So in that position, you
3 were -- what were your responsibilities and duties?

4 A. To oversee the various investigative
5 elements within the office of the attorney general,
6 to assist the attorney general in law enforcement
7 legislative initiatives. I -- I served as the
8 attorney general's representative on a number of
9 boards where the -- where the attorney general would
10 have a statutory appointment. I had budgeting
11 responsibilities and the -- the typical bureaucratic
12 responsibilities of a -- of a senior administrator.

13 Q. Were you deemed as an assistant attorney
14 general or a deputy attorney general?

15 A. I was --

16 Q. Or with another title perhaps?

17 A. Yes, I did have -- I -- I did have some
18 additional titles. I don't know that I'd say much in
19 terms of responsibilities --

20 Q. Okay.

21 A. -- but I -- I had been designated as an
22 assistant attorney general as well.

23 Q. So I take it the attorney general has
24 several, I would imagine, assistants in this state at
25 the time you were there?

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1 A. At the time I was there, the office was
2 comprised of the attorney general, a chief deputy,
3 12 chiefs, and then I don't know how many assistant
4 attorney generals.

5 Q. Okay. And did -- who has the -- in our
6 state, the attorney general has jurisdiction over
7 murder cases.

8 Does that apply in your -- in this state?

9 A. Not in the same way that it does in
10 New Hampshire and Maine and some of the Northeastern
11 states.

12 Q. Okay.

13 A. It's a -- it's a little different.

14 Q. And with regard to your job at -- with the
15 attorney general, first of all, who was the attorney
16 general at the time?

17 A. At the time I was appointed, the attorney
18 general was Mark Shurtleff. His successor was John
19 Swallow. His successor and the current attorney
20 general, my current employer, is Sean Reyes.

21 Q. And -- and this is essentially a civil
22 service job, not a political job, correct? Or is it?

23 A. The appointment was a nonpartisan, noncareer
24 service job, so --

25 Q. Okay.

1 A. -- it's not -- in the context we use civil
2 service in Utah, a protected status, and the answer
3 is no.

4 Q. Okay.

5 A. But you didn't have to be of a particular
6 party.

7 Q. So I -- I guess I'm -- I'm confused about
8 what you do now.

9 Do you still have that job?

10 A. No.

11 Q. When did you give that job up?

12 A. April Fools' Day of 2014.

13 Q. Okay. And at that time you became --
14 what -- what did you do next for employment?

15 A. I -- the very next day, I started working
16 full time with the company for which I worked part
17 time for some years before that, and that's Lexipol.

18 Q. Okay. And do you hold any other positions
19 or did you?

20 A. I do now.

21 Q. And what is that?

22 A. I -- on November 2nd, I transitioned to a
23 full-time employment as a special agent for the
24 attorney general. I have some other part-time
25 responsibilities that bring some limited income.

1 Q. Well, why don't you tell me what that --
2 that is.

3 A. Pretty boring. I am the chairperson of the
4 merit commission, the Peace Officer Merit Commission
5 of Greater Salt Lake County. And I'm the chair of
6 the Salt Lake County Deputy Sheriff Merit Commission,
7 and I am the administrative law judge for Park City
8 Municipal Corporation.

9 Q. So is there any significance to the peace
10 officer group that you're involved with? In other
11 words, what -- what does it mean, peace officer?
12 Does that mean police officer?

13 A. The --

14 Q. That's what they used to call them, an
15 officer of the peace.

16 A. Right. The -- in -- in Salt Lake County,
17 there are a couple of different but related law
18 enforcement agencies. The Unified Police Department
19 of Greater Salt Lake County, and that's -- I serve as
20 the chair of their merit commission. The merit
21 commission is called the Peace Officer Merit
22 Commission of Greater Salt Lake County. That entity
23 provides policing services for the unincorporated
24 areas of Salt Lake County and for a number of
25 incorporated municipalities within Salt Lake County

1 that have entered into an agreement for mutual
2 policing.

3 So it's a -- it's a legislatively created
4 special service district.

5 Q. And are they called police --

6 A. They are called police officers.

7 Q. -- peace officers?

8 A. They're -- they're called police officers.

9 Peace officer is a term of art used in our state
10 statute.

11 Q. Which means?

12 A. Police officer.

13 Q. Okay.

14 A. So a peace officer -- a peace officer in
15 Utah under the law is a -- is the umbrella.

16 Under that, there may be law enforcement
17 officers, and that's what you think of as traditional
18 cops on the street, detectives and so forth. And on
19 the other side, there may be corrections officers or
20 special functions officers. So corrections officers or
21 obviously work in jail. Special functions officers
22 may do ordinance enforcement, so forth.

23 Q. Okay. What -- what is your view of the role
24 of a police officer today?

25 A. Oh, my.

1 Q. Briefly.

2 A. Thank you.

3 A law enforcement officer today is -- the
4 role really has not changed. The execution of the
5 role perhaps has. But it is in the grand sense to
6 serve and protect the public and maintain order
7 and -- and security in the course of serving the
8 public.

9 Q. Okay. Let me ask you: At some point, as I
10 understand it, you went to law school and received
11 your law degree and became a member of the bar; is
12 that correct?

13 A. Yes.

14 Q. And tell me about that.

15 When was that?

16 A. From 1987 to 1990.

17 Q. Okay. Where did you go to law school?

18 A. J. Ruben Clark Law School which is at
19 Brigham Young University in the south of us here.

20 Q. Okay. And did you do any legal work as a
21 result of your becoming a lawyer?

22 A. Yes.

23 Q. What type of legal work did you do?

24 A. I -- I practiced law in a large firm.
25 I've --

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1 Q. Give me some time frame, approximately.
2 A. Okay. So right after -- right after law
3 school, I clerked for a year on the court of appeals
4 here in Utah and then went -- after that for a year
5 and clerked for the Fifth Circuit Court of Appeals,
6 based in New Orleans. I actually clerked for a judge
7 whose home office was in Houston.

8 After that, I practiced law at the biggest
9 firm here in town, a big firm, Parsons Behle Latimer.

10 Q. What type of law did you practice there?
11 A. I -- I primarily practiced employment law.

12 Q. Did you -- I'm sorry.

13 Did you ever practice criminal law?
14 A. I practiced criminal law in the context that
15 when a significant client or a client's family member
16 would have an encounter with the law, more often than
17 not, I became involved in that matter. I practiced
18 criminal law in the more traditional sense.

19 After that position, I became -- I was
20 appointed to a position as chief deputy county
21 attorney in Uintah County, and I held that position,
22 I don't know, through about 2001.

23 Q. How many years?

24 A. Seven or eight.

25 Q. So as a county prosecutor, did you handle

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1 all types of prosecutions?

2 A. No.

3 Q. What did you do?

4 A. Well, you know, that's -- that's not -- I
5 did -- occasionally I would take a turn at -- at city
6 court. So I -- I handled some misdemeanor
7 prosecutions, but --

8 Q. Well, the main thrust of your job.

9 A. Well, the thrust of my job was to both
10 administer the offices as the chief deputy and also
11 to prosecute violent crimes and some drug crimes for
12 a period of time. I -- I also helped create a drug
13 court and served in that drug court.

14 On occasion, I would take a rotation in a
15 misdemeanor court. The only thing I never did, I
16 never practiced anything in the juvenile realm.

17 Q. Have you ever prosecuted a police officer
18 for misconduct?

19 A. With me as lead counsel?

20 Q. Yes.

21 A. Not in the criminal sense.

22 Q. Okay. What sense?

23 A. Administrative.

24 Q. Administrative -- okay.

25 Have you ever defended a police officer --

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1 A. Yes.
2 Q. -- who was charged with criminal conduct?
3 A. Yes.
4 Q. As -- as county attorney?
5 A. No.
6 Q. As a private attorney?
7 A. Yes.
8 Q. And any involving deadly force?
9 A. No.

10 Q. Have you ever sued a police department or a
11 police officer for -- in -- in civil court for
12 damages?

13 A. As counsel, no.

14 Q. Well, what do you mean by that answer?
15 As -- in some other capacity?

16 A. I -- I mean, I've never sued. I've never
17 filed an actual lawsuit. I've been a plaintiff.

18 Q. You've been a plaintiff.

19 A. Yes.

20 Q. Tell me about that. Plaintiff in cases in
21 which you've been sued?

22 A. No. A case in which I was a plaintiff.

23 Q. You were the plaintiff. Okay.

24 Against police officers?

25 A. No, against a police department.

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1 Q. And -- and -- and the subject matter?

2 A. Let me just cut to the chase.

3 So in about 1982, our police association had
4 some disagreement with the calculation of overtime
5 and the city declined to pay overtime, I believe it
6 was on court appearances. I don't remember. It's
7 been 30 years plus.

8 Q. That's all right.

9 A. So they brought around a form and said if
10 you sign this form, just know that you're actually
11 suing the city and you can't sue the city without
12 suing the chief. So sign this if you think you're
13 going to -- if you want to be part of this. Here's
14 what we think you're going to get out of it in terms
15 of dollars. I did -- I got enough for a brand-new
16 set of tires for my 1979 Ford Pinto, and that was the
17 sum total of my experience as a plaintiff in civil
18 court.

19 Q. So justice prevailed.

20 A. I never really understood it. I do now that
21 I'm a lawyer.

22 Q. You cashed the check, though.

23 A. You're dang right I did.

24 Q. Okay. In any event, did you -- have you
25 ever been involved in any other litigation concerning

1 police action? That's a broad question.
2 A. Yes.
3 Q. Other than you've testified to.
4 A. Yes.
5 Q. What did -- and what was that?
6 A. So I've served as a -- an expert witness in
7 cases where officers were accused of excessive force,
8 and I've -- I have been adverse to officers in those
9 contexts. I have spent a number of years as a bureau
10 chief in the Utah Department of Public Safety. And
11 one of the bureaus at some point that I oversaw was
12 the investigations bureau at Peace Officers Standard
13 and Training, which is typically referred to by its
14 acronym, POST. And overseeing the investigations
15 bureau meant, in some cases where there were positive
16 findings by investigators who worked for me, that I
17 would be the signatory complainant in an
18 administrative action to revoke that officer's --
19 Q. Okay.
20 A. -- certification or licensure as a police
21 officer.
22 Q. Okay. So -- well, let me just summarize it,
23 if I can. I want to be clear.
24 In terms of suing police officers for
25 misconduct, you've never done that.

1 A. No.
2 Q. In terms of prosecuting a police officer for
3 misconduct, you've never done that.
4 A. I don't believe that I have. I'm not
5 confident that that's the -- I don't recall.
6 Q. And with regard to any kind of expert
7 testimony -- I think you've already testified to
8 this. Forgive me for repeating -- you have not
9 testified -- you have not represented any plaintiffs
10 in cases involving suits against police officers for
11 the reasons you've stated.
12 A. Represented as in counsel?
13 Q. No. Excuse me. As -- as an expert witness.
14 I should have said. Thank you.
15 A. I have, although not in shooting cases.
16 Q. So your -- your contract permits you to do
17 that?
18 A. No. That was prior --
19 Q. Prior to the four years.
20 A. Correct. It's actually been -- I don't know
21 how many years, but yes, prior.
22 Q. And have you received any requests from
23 plaintiffs' attorneys in the last four years, let's
24 say, to review cases for them in anticipation of
25 litigation against law enforcement people?

1 A. Yes.
2 Q. And you've turned them down for the reasons
3 you've just given us?
4 A. Correct.
5 Q. Prior to that, you've been -- you say
6 you've -- you may have had a -- a case involving
7 deadly force, maybe one case, but you're not sure.
8 Am I correct on that?
9 A. Correct.
10 Q. And did you review other cases by police --
11 excuse me, by plaintiffs' lawyers, other than that
12 one case, in which they claimed -- or they were
13 looking for expert witnesses to testify in wrongful
14 death actions involving police officers using deadly
15 force? Any requests is the -- is the --
16 A. Well, I don't recall whether I -- I've --
17 I've had requests where I've reviewed cases with the
18 understanding that I wouldn't testify to them.
19 And I -- I don't know whether -- I don't
20 believe any of those involved deadly force.
21 Q. Okay. And finally, I -- I noted on our
22 Exhibit A that we also asked you -- just to be sure
23 we're being exhaustive about this, which is my intent
24 by asking you these questions -- that you produced
25 all the writings, recordings, notes, drafts,

1 memorandum, or any memorialization of any nature
2 involved in this case; is that correct?
3 MR. MARCHESI: Subject to the objection
4 previously indicated with respect to the manner of
5 requesting the document.
6 You can certainly answer the question.
7 THE WITNESS: I don't know that I saw that,
8 but I brought for you today at Mr. Marchesi's
9 request, my entire file.
10 I don't -- as you look at my hands, you may
11 see that there are bumps on my knuckles. I don't
12 write very much at all. I don't even have a pen. I
13 don't keep notes.
14 BY MR. LILLEY:
15 Q. Well, the -- the new iPhone, you can just
16 talk to into it.
17 A. I'm learning, actually, to -- to do that.
18 Q. And I shouldn't be instructing people on how
19 to use the iPhone, but I do know you can do that.
20 A. Well, I have grandchildren.
21 Q. Yeah.
22 The second paragraph of the Exhibit A, and
23 you can look at it if you want to, was any audio or
24 video.
25 You think you've given us everything you

1 have?

2 MR. MARCHESSI: Same objection.

3 Go ahead.

4 THE WITNESS: All audio and video that I
5 have is on the CDs --

6 BY MR. LILLEY:

7 Q. Right.

8 A. -- and it's in this packet here.

9 Q. And sketches and diagrams and so forth,
10 you've given us or you probably don't have any, do
11 you?

12 MR. MARCHESSI: Same objection.

13 THE WITNESS: I think I have one --

14 MR. LILLEY: We understand you have a
15 continuing objection here, okay, rather than keep
16 interrupting, because you already accepted this. I
17 disagree with you, but we understand you have a
18 continuing objection.

19 BY MR. LILLEY:

20 Q. And you've -- you've taken -- I think your
21 last answer was you have -- there's nothing you
22 haven't produced.

23 A. There -- there is not.

24 Q. And -- but I -- I have to be specific here.
25 Pardon me for being so.

1 a -- a -- I think there's a paragraph in there about
2 fees, but I don't use a retainer agreement.

3 Q. Right, there is.

4 With regard to payment to -- to you, at this
5 point, how much have you been paid?

6 A. I don't recall.

7 Q. Have any idea?

8 A. I -- I don't.

9 Q. I mean, that would be -- I think that would
10 actually be encompassed in our Exhibit A of writings
11 or things associated with this -- with this case.

12 So would you -- could you provide that with
13 us -- for us the -- the -- the -- the bills and the
14 amounts that you've been paid?

15 MR. LILLEY: Are you willing to do that?

16 MR. MARCHESSI: I will consider that request
17 subject to the objection that's been previously been
18 made on the record today.

19 BY MR. LILLEY:

20 Q. You have bills, I take it, that were given?

21 A. I do.

22 Q. I would like to have those. And any checks
23 or copies of them that you have, I would like to
24 have.

25 Would you provide that subject to your

1 Photographs, have you been given any or
2 shown any photographs, which I did not see in your --
3 in your portfolio here. So the question is --

4 A. I've been given photographs. They're in my
5 portfolio. I don't -- if you mean you didn't see and
6 you looked?

7 Q. I didn't look carefully, sir.

8 A. I didn't look, but there are some
9 photographs in here. I have not seen any photographs
10 that are not in here.

11 Q. Okay. Photographs from the scene,
12 photographs of the positions of Mr. Mangino's car
13 relative to the house, have you seen any of those?

14 A. Yes, and they're in there.

15 Q. Okay.

16 A. Now, you may not have seen all of them
17 because there -- some of them are on a disc, but
18 they're labeled.

19 Q. Okay. Now, with regard to your retainer
20 agreement, would that be contained in your
21 designation to the U.S. District Court, District of
22 Maine? Is that -- do you consider that to be your
23 sum total of agreement, opinions, fee structure,
24 those things?

25 A. I don't typically use a retainer. So I have

1 lawyer's advice -- or not your lawyer's, but the
2 lawyer that hired you's advice?

3 MR. MARCHESSI: Well, I -- I will have him
4 provide those to me, and I will make a determination
5 as to whether they should be produced. And if not, I
6 will indicate that to you so you can pursue the
7 matter further.

8 BY MR. LILLEY:

9 Q. The -- your -- I -- your -- your fee
10 schedule, just curious, I noticed it because we
11 talked about it a bit a few minutes ago.

12 As I understand it -- and I have -- do you
13 have a copy of your report? I have one here if you
14 want it. I can get mine or yours. Take your choice.

15 A. I know there's one somewhere. I don't care.
16 If you've got it right here.

17 Q. If it's easier, I'll do it right here.

18 I've got a book here with various documents,
19 some of which I'm going to use and some of which I'm
20 not. I put it in this form for use of carrying.

21 I -- I'm showing you now your expert witness
22 designation of you and Mr. Gohn.

23 A. Oh, okay.

24 Q. So I think if you --

25 A. I didn't do this.

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<p>1 Q. I understand that. 2 A. Okay. 3 Q. But I think your report's right here. 4 A. Here it is. 5 Q. And that's under Exhibit A. 6 A. Yes. 7 Q. By the way, did you read Mr. Gohn's -- 8 he's -- you're kind of lumped in with him, if I can 9 use that word, on the front page of this expert 10 designation. 11 Did you read any of the brief summary of 12 what he's going to testify to? 13 A. I've not seen anything that he wrote. 14 Q. Okay. So you don't have an opinion one way 15 or the other whether his opinions are valid or 16 subject to critique or not. 17 A. No. 18 Q. Okay. With regard to your report, then, I 19 think it's right in front of you. 20 A. Okay. 21 Q. And if I look at the second page of your 22 report -- that's not the same page. 23 Hold on just a moment. Withdraw that. 24 Well, maybe you can find it. I'm looking 25 for your fee schedule. I thought it was at the</p>	<p>1 second page. 2 A. It's usually toward the end, page 23. 3 Q. Page 23. There you go. Thank you. 4 Your fee schedule on page 23 is \$250 per 5 hour for examination of reports and documents. Site 6 visits, interviews, administrative tribunal, 7 depositions -- deposition or court testimony with a 8 minimum of a thousand dollars -- a thousand -- 9 minimum of a thousand dollars for deposition or court 10 testimony, correct? 11 A. Yes. 12 Q. And it -- then it goes on to say, I bill for 13 actual travel expenses and a travel fee of a thousand 14 dollars per day or part of a day for travel to 15 Western States and \$1500 per day part day outside of 16 Western States; is that correct? 17 A. Yes. 18 Q. So you charge in addition to your -- your -- 19 your depositions, let's say, or court testimony, at 20 250 an hour, you charge in addition to that days -- a 21 thousand dollars a day for your days you travel -- 22 A. I charge -- 23 Q. -- or 1500 if it's beyond. 24 A. -- a flat fee for traveling in addition to 25 actual expenses depending on whether it's a state</p>

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1 contiguous to the Western States or not.
2 Q. Yeah. A thousand or \$1500.
3 A. Correct.
4 Q. And that's per day of travel.
5 A. Correct.
6 Q. That's -- and so we're clear, that -- if you
7 fly in an airplane to Portland, Maine, that's a
8 thousand dollars, right?
9 A. No.
10 Q. Okay. Then I can still probably use the --
11 a thousand dollars to get there and a thousand
12 dollars to come back, isn't it?
13 A. No -- nobody is going to call Portland,
14 Maine, although it's a beautiful city with a
15 restaurant I really like, a Western State. So that
16 would be \$1500 --
17 Q. Oh, 1500. I'm sorry.
18 A. Yeah. To -- to -- to travel plus the actual
19 expenses plus the time spent working there.
20 Q. Right. Sorry. I said a thousand. It
21 should have been the correction was \$1500 for the
22 travel -- for being on the plane all day.
23 A. I would have been happy to come to Portland.
24 Q. No, no. I'm not -- I'm not -- I'm not
25 asking you for -- for your pleasure, sir. I'm just

1 trying to get -- to be sure I understand your fee
2 schedule.
3 Okay. Let's look at your report a little
4 bit, if we can. Okay?
5 Now, do you agree with me that in general, a
6 witness, an expert witness particularly, conclusions
7 are only as good as the accuracy of the underlying
8 facts supporting it?
9 A. I think that's a fair general proposition.
10 Q. I mean, is -- is there anything about that
11 proposition you disagree with?
12 A. No.
13 Q. If you don't have the facts right, you
14 oftentimes can't get your conclusions correct, and
15 they could be fraught with error.
16 Do you agree with that?
17 A. I agree.
18 Q. Okay. I'm -- I'm going to kind of go
19 through this, and I'm hoping to do this before lunch
20 and finish it before lunch, but let's see what we can
21 do.
22 On the first page of your report, you talk
23 about the things that you've been -- that's been
24 submitted to you and you've -- we've gone through, I
25 think, most of them. Let me just be sure that with

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1 regard to the third or fourth down, where it says
2 Cumberland County office policy manual excerpts, I
3 think we talked about that, did we not?

4 A. Yes, sir.

5 Q. And you identified that.

6 A. Yes, sir.

7 Q. And with regard to the next line, Cumberland
8 County Office of Internal Affairs report, you
9 certainly have that in your possession and you've
10 reviewed that, correct?

11 A. Yes, sir.

12 Q. You -- you did not list your -- strike that.

13 With regard to the second page, you -- you
14 listed the report from the Maine Attorney General and
15 you've certainly looked at that, right?

16 A. Yes.

17 Q. And you have -- you have transcripts of
18 Zachary Welch, Cook, Mangino, Marion, and MacVane and
19 Fournier that you've looked at; is that right?

20 A. Yes.

21 Q. And that those -- when did you look at
22 those? Do you know? Perhaps they're not at the same
23 time, but a time frame, if you know.

24 A. The -- the time frame would have been
25 sometime in -- most likely, June and early July of --

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1 of this past year. I don't recall with any
2 specificity.

3 Q. Of 2014, correct? Or prior to writing the
4 report.

5 A. Prior to writing the report.

6 Q. Okay.

7 A. I think that the report is dated July, if
8 I -- yes. So certainly prior to July 24th.

9 MR. MARCHESSI: Of what year?

10 MR. BENJAMIN: That's 2015.

11 THE WITNESS: '15. This year.

12 MR. LILLEY: '15. I'm sorry, I said '14.

13 Yes, '15.

14 BY MR. LILLEY:

15 Q. So at the time you wrote the report, you had
16 everything, including the interview with
17 Deputy Mangino, personal interview that you -- is the
18 last entry on page 2, correct?

19 A. Correct.

20 Q. And that personal interview would be the
21 phone interview you've testified about, right?

22 A. Yes, sir.

23 Q. So let's turn to page 3. And I'm going to
24 be asking you -- I've got some notes here. I'm going
25 to be asking about some of the statements you've made

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1 and some of the conclusions you've drawn, and I'd
2 like to discuss them at least briefly.

3 When you -- looking at A on page 2, at the
4 very end of that first paragraph, you -- you make the
5 note -- you make the statement that Deputy Mangino
6 was accompanied by an unarmed nonpolice ride-along
7 passenger Zachary Welch, correct?

8 A. Yes.

9 Q. Do you know, sir, that whether or not
10 anybody at the scene knew that except Mr. Welch and
11 Mr. Mangino?

12 A. I don't.

13 Q. Did you ask him whether or not he had --
14 that was an authorized ride-along?

15 A. No.

16 Q. Did you ever determine whether it was?

17 A. I never considered that question.

18 Q. One of the issues later on in your report
19 you talk about is the danger or the possible danger
20 that the ride-along passenger presented, correct?

21 A. We discussed that, yes.

22 Q. And when Mr. Mangino was conversing by radio
23 with his fellow officers and other people, none of
24 them knew that he had a ride-along passenger.

25 Do you know that to be the case?

1 A. I don't know.

2 Q. Is that of any significance that there's a
3 ride-along nonpolice officer at the scene of this
4 nature?

5 A. It -- it is of significance.

6 Q. What is the significance?

7 A. As discussed in my report, that's another
8 person now known to be within a zone of danger.

9 Q. Isn't it less than good law enforcement to
10 take a person, a ride-along person, to a scene in
11 which you've been informed that there's guns, perhaps
12 domestic violence, and perhaps somebody who's
13 mentally ill? Is that good law enforcement practice?

14 A. As -- as a general proposition, probably
15 not. And there are a number of variants that would
16 increase or decrease or mitigate or even obviate the
17 danger involved.

18 Q. Well, did you understand that Mr. Mangino
19 lived very close to the actual scene of the -- of the
20 shooting?

21 A. No.

22 Q. And that Mr. Welch's vehicle was in that
23 vicinity?

24 A. I did not know how close it was.

25 Q. In other words, I'm suggesting that the

1 facts are that it would have been easy or at least it
2 would not have been difficult to drop Mr. Welch off
3 at his vehicle before attending a scene with
4 potential violence concerning firearms, mental
5 illness, and domestic violence.

6 Would that be -- wouldn't that be the better
7 practice?

8 A. Again, I -- I suppose the additional
9 representation that the home and car were nearby
10 is -- is a factor, but there are -- there are a
11 number of circumstances and factors that could
12 mitigate, obviate, increase, or decrease the -- the
13 danger. So it certainly would have been an
14 alternative.

15 Q. Can you tell me anything that would have
16 decreased the danger of having a ride-along in those
17 circumstances?

18 A. It -- it really depends on where the
19 ride-along is at in any given moment in the exchange
20 between persons.

21 Q. Well, without -- what I'm suggesting is that
22 if the ride-along had not been there, then it would
23 not be an issue that would have to be concerned -- in
24 which Mangino would have to be concerned about.

25 Do you agree with that?

1 A. Yes.

2 Q. And did you know that at the time that he
3 was -- Mr. Welch was riding along on that day, that
4 it was unauthorized by his department?

5 MR. MARCHESI: Objection to form. That's
6 not accurate.

7 THE WITNESS: I -- I don't know that to be
8 the case.

9 BY MR. LILLEY:

10 Q. And you certainly understand that the
11 information, if you -- I'm -- I'm kind of going along
12 with your report here, so if you want to go with me,
13 you can see where I'm going.

14 That the -- the two Windham police officers
15 and Mangino drove toward the McKenney residence. I'm
16 on the second paragraph learned. And they had
17 learned that the house described as full of guns.

18 That certainly heightens the possibility of
19 danger, does it not?

20 A. It does.

21 Q. Now, when you say -- for instance, the next
22 paragraph, Vicki McKenney told the dispatcher she
23 believed her husband would shoot himself, where --
24 where did you get that information?

25 A. From the reports provided to me.

1 Q. And that would include her actual words,
2 would it not, that when she talked to the -- to the
3 dispatcher, 911 dispatcher?

4 A. I don't remember exactly what she said, sir.

5 Q. Is the more accurate statement that she said
6 that she believed her husband might shoot himself
7 because he was distraught over pain? I mean, it's --
8 it's -- it's a nuance, but isn't it a different
9 nuance?

10 MR. MARCHESI: Objection to form.

11 THE WITNESS: I -- I don't recall what she
12 said, but you are correct, that is a nuance.

13 BY MR. LILLEY:

14 Q. And -- and you know that -- I mean, I don't
15 want to mince words here. Lawyers often get accused
16 of that.

17 But the difference between might and would
18 shoot himself, there is a difference, is there not?

19 A. Yes.

20 Q. Okay. And let's move down, if we can, to
21 the next paragraph. I'm not going to read the whole
22 thing here, I can assure you, but let's go down a bit
23 after and look and see about some other statements
24 that you made in your report on a factual basis.

25 Now, you understand, do you not, that in

1 terms of Mrs. McKenney, that when the three officers
2 arrived, two first and one right behind them,
3 Mangino, that Mrs. McKenney was visible and -- and
4 either in the garage or partway in the garage and
5 partway out of the garage.

6 Do you understand that to be the case?

7 A. Yes.

8 Q. And that the officers talked to her.

9 A. (Nods head.)

10 Q. Correct?

11 A. Yes.

12 Q. And they -- and they talked to her to see if
13 she was okay, if she was in good physical shape.

14 MR. MARCHESI: Objection.

15 BY MR. LILLEY:

16 Q. Among other things.

17 Do you -- do you understand that to be the
18 case?

19 A. I -- I recall they spoke and I -- I don't
20 remember the exact words, but I think there was some
21 questioning or assessment of whether she'd been hurt.

22 Q. And it was determined that she hadn't been
23 hurt, correct?

24 A. Yes.

25 Q. And that there was no domestic violence.

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1 There was more concern she had for her husband's
2 well-being. That was what they determined after
3 seeing and talking to her.

4 Do you agree with that?

5 MR. MARCHESI: Objection to form.

6 THE WITNESS: I -- I don't know that any of
7 them ever reached that specific conclusion.

8 BY MR. LILLEY:

9 Q. Okay. Well, at least you know that they
10 didn't see that she was damaged or injured in any
11 way, correct?

12 MR. MARCHESI: Objection to form.

13 BY MR. LILLEY:

14 Q. That's what I mean by that is there's no
15 broken bones. There's no bruises. There's no
16 indication of any kind of assault.

17 A. I don't believe there was.

18 Q. And she did tell him that she was worried
19 about his well-being, that she was afraid he was
20 going to commit suicide.

21 A. Correct.

22 Q. Now, if -- you understand that at that
23 particular point, that the officers, do you
24 understand, devised a plan to go in to where
25 Mr. McKenney was and confront him?

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1 Do -- do you know that to be the case?

2 A. I don't recall.

3 Q. Would that make a difference?

4 A. Not at this point.

5 Q. It sure would -- it sure would with regard
6 to accuracy, correct? Wait a minute. Let me go back
7 to that answer, "Not at this point."

8 What do you mean by not at this point?

9 A. Not at that point that's being described and
10 that you've just read about.

11 Q. Well, okay. If there was a plan, however
12 brief, that -- that Officer Fournier would go in
13 first and the other two officers would be behind them
14 or beside them or right in the same vicinity, and
15 that he would tase Mr. McKenney, that would be a
16 different factual pattern than you seem to have set
17 up in your -- in your report.

18 Do you agree?

19 A. Yes.

20 MR. MARCHESI: Objection to form.

21 BY MR. LILLEY:

22 Q. In fact, I believe that -- that the record
23 will show that what I've just suggested is the case.

24 MR. MARCHESI: I object to that.

25 ///

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1 MR. BENJAMIN: Object to the --
2 BY MR. LILLEY:

3 Q. Let's start with that.

4 MR. BENJAMIN: Objection to the form.

5 MR. MARCHESI: Join.

6 THE WITNESS: I'm not sure I -- I think you
7 said "devised a plan." I understand that the two
8 Windham officers spoke with one another and then
9 entered the home first independently.

10 BY MR. LILLEY:

11 Q. Well, you understand all three of them did,
12 two by the garage door and one by the front door;
13 isn't that correct?

14 A. Yes.

15 Q. And you say in the next paragraph -- and I'm
16 just trying to figure out where you're getting your
17 information, and we'll go from there --
18 "Deputy Mangino could see that Officer Cook and
19 Fournier had their guns drawn."

20 That -- that's inaccurate, isn't it?

21 A. I don't believe so.

22 Q. Do you recall that -- that the -- there was
23 a plan according to the radio communications for them
24 to go in, and Officer Fournier, in fact, had his
25 Taser out and the other two had their guns drawn?

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1 BY MR. LILLEY:

2 Q. If -- if I'm correct, was tasing a viable
3 option of nonlethal force in this case?

4 MR. BENJAMIN: I'll object to the extent you
5 didn't put a time frame on it in this whole event.

6 MR. LILLEY: These are all speaking
7 objections that are inappropriate.

8 MR. BENJAMIN: I'm just telling --

9 MR. LILLEY: You're suggesting answers for
10 this witness.

11 MR. BENJAMIN: What answer did I suggest by
12 asking you to say when?

13 MR. LILLEY: Time frames. Time frames.

14 MR. BENJAMIN: Yeah. Well, object to the
15 question.

16 BY MR. LILLEY:

17 Q. What I'm asking you, sir, would -- would
18 that be a viable alternative to -- to lethal force?

19 A. As -- as you phrased the question, one could
20 answer either yes or no.

21 Q. Well, why -- why would it -- why would
22 you -- okay.

23 You're an expert in Tasers, too, aren't you?

24 A. I've testified in Taser cases.

25 Q. And you've taught Taser -- the use of Taser?

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<p>1 A. Yes, sir. 2 Q. Both from a functional use and from a legal 3 use? 4 A. Yes, sir. 5 Q. And Tasers are -- are effective -- I'm going 6 to ask you to explain a little bit about Tasers. But 7 they're effective in one -- in one option to 20, 8 25 feet maximum? 9 A. That's exceedingly rare. 10 Q. Well -- well, and I'm -- what do you mean 11 it's rare? 12 A. I -- I mean the answer to your question is 13 yes, but it is exceedingly remotely rare -- 14 Q. Okay. 15 A. -- if that is true. 16 Q. Have you ever seen or have you ever taught 17 or have you ever heard -- I'll -- I'll keep the field 18 as broad as I can -- that the technique of going in 19 with a Taser with cover from one or two officers in 20 this case with their handguns, is a viable option for 21 a person acting as similar to Mr. McKenney? 22 MR. MARCHESI: Object to the form of the 23 question. 24 THE WITNESS: There can be circumstances 25 where an electronic control device is -- is prepared</p>	<p>1 for deployment with other force options immediately 2 available, and that may include officers with a 3 handgun. 4 BY MR. LILLEY: 5 Q. Right. And in this case, if I'm correct 6 about the facts that they've now been developed, I'm 7 not sure you've been furnished with all of that yet, 8 there is a Taser in Mr. Fournier's hand as he goes in 9 and he's being covered by Officer Cook and 10 Officer Mangino with their handguns out, their 11 service revolvers. 12 Do you understand that to be the case? 13 MR. MARCHESI: I object to form. 14 Mischaracterizes -- misstates the record evidence. 15 BY MR. LILLEY: 16 Q. If that's the case, do you think that's a 17 viable option to deadly force? 18 MR. MARCHESI: Are you asking him to assume 19 those facts as a hypothetical? 20 BY MR. LILLEY: 21 Q. You understand the question? 22 A. I think I understand the question. 23 Q. I mean, is that at least a viable option 24 rather than resorting as a first resort to -- to -- 25 to deadly force?</p>
<p>1 A. Understanding that I am very sure those are 2 not the facts, as -- as a hypothetical -- 3 Q. You're sure those aren't the facts that I 4 just said. 5 A. Correct. 6 Q. Okay. 7 A. With that as a hypothetical, and given no 8 more flesh to the hypothetical, I would say no. 9 Q. No what? 10 A. No, that's not a reasonable -- question. 11 Q. Why? 12 A. A electronic control device should not be 13 either a primary or even a -- a secondary tool for a 14 person at close range who is holding a loaded weapon 15 in a confined and narrow area in low light conditions 16 without any form of ballistic shield for the other 17 officers and that -- the -- the narrow, confined 18 hallway is -- is simply a dynamic that makes the 19 cover, if indeed available, very ineffective and very 20 limited. 21 Q. Well, if the two had their guns pointed or 22 at least in the -- pointed in the direction of 23 Mr. McKenney with Mr. Fournier taking the lead with 24 his Taser, that is an acceptable law enforcement 25 technique, is it not?</p>	<p>1 MR. BENJAMIN: Objection. Misstates the 2 evidence. 3 MR. MARCHESI: Objection. 4 THE WITNESS: I do not believe so. 5 BY MR. LILLEY: 6 Q. Okay. So your -- your -- your 7 problem, I guess is what you're saying, is that 8 there's simply no cover. They have no cover under 9 those circumstances, correct? 10 A. That's one of many issues. 11 Q. Well, if that -- I mean, if they had -- if 12 they were in that same position with the Taser and 13 the other officers had their two guns and they're in 14 the house, if they were behind cover, that would at 15 least be a -- a possibility to make that a -- a 16 reasonable law enforcement option. 17 Do you agree with that? 18 A. If they had effective ballistic shielding, 19 then that situation would change the dynamics and 20 that would be an option worth exploring. 21 Q. Well, do you know that they've testified to 22 the fact that the officers were behind walls in a -- 23 in a -- in a scooched down or in a position of being 24 on one knee but behind walls and looking around at 25 Mr. McKenney?</p>

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1 MR. MARCHESI: Objection to form.
2 BY MR. LILLEY:
3 Q. Do you know that that's what they've
4 testified to, both Fournier and Cook.
5 A. I -- I don't recall.
6 Q. That would certainly be cover, wouldn't it?
7 A. Absolutely not.
8 Q. It would not be cover.
9 A. No.
10 Q. Why not?
11 A. Well, I can speak to that on a number of
12 levels. Just aside from ballistics expertise, common
13 sense for anyone who's faced a .357 Magnum revolver,
14 the projectile can easily puncture multiple layers of
15 the construction materials typically used in
16 residential dwellings.
17 I can speak from personal experience having
18 seen a .357 caliber bullet and indeed a .38 caliber
19 bullet fired from a .357 Magnum revolver penetrate
20 multiple interior walls. It's -- it's like -- I
21 wouldn't say that it is as ineffective as tissue
22 paper, but it's not very far behind.
23 Q. But you understand that in -- in my
24 scenario, which I can use -- I guess, I'll use to
25 avoid all these interruptions as a hypothetical,

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1 although I believe those are the facts, that in my
2 scenario, there's one person with a Taser, two are
3 covering him with a gun, and they at least have that
4 much cover.
5 Isn't that a time when the selection of the
6 Taser would be at least acceptable from a law
7 enforcement standpoint?
8 A. No.
9 Q. Well, you understand that Mr. McKenney was
10 not pointing the gun at either -- any of these
11 officers.
12 Do you understand that to be the case?
13 MR. MARCHESI: At what point in time?
14 THE WITNESS: In your hypothetical, I -- I
15 don't know that.
16 BY MR. LILLEY:
17 Q. Well, no --
18 A. I assume --
19 Q. It's not really a hypothetical that
20 Mr. McKenney never pointed the gun at any of the
21 three officers in the house.
22 Do you know that to be the case?
23 A. I believe I recall that someone stated that.
24 Q. So when you're saying that it's not a viable
25 alternative, you're suggesting that -- that while

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1 he's not pointing the gun, that he has the ability to
2 do so.
3 Is that -- is that what you're saying? That
4 he could do so.
5 A. If -- if that's -- that wasn't what I was
6 saying, but if -- if you're asking me that question,
7 the answer --
8 Q. Well, I'll ask you that question.
9 A. Sure. Yes.
10 Q. But there was no indication that he ever
11 made any attempt to.
12 Do you know that to be the fact? In the
13 house I'm talking about. We'll -- we'll go to the
14 outside in a moment.
15 A. I don't believe that any of the officers
16 reported that he made an attempt to.
17 Q. So wouldn't that be a good time in -- in
18 addition to the fact that they had cover, that there
19 are two officers who have guns pointed in the
20 direction of -- of the -- of the deceased --
21 MR. BENJAMIN: I'm going to object that
22 you're misstating the evidence right there.
23 BY MR. LILLEY:
24 Q. -- and that -- and that -- and that there's
25 a Taser within striking distance, perhaps, isn't the

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1 added fact that that would contain the situation
2 within the house be a more -- would be a more
3 effective law enforcement maneuver?
4 MR. MARCHESI: Objection to form.
5 THE WITNESS: Taking that question as a pure
6 hypothetical with substantially flawed facts, the
7 answer is still no.
8 BY MR. LILLEY:
9 Q. Why do you say the facts are flawed when you
10 don't know them?
11 MR. MARCHESI: Object to form.
12 BY MR. LILLEY:
13 Q. I mean, in other words, he's objecting that
14 I'm not saying it right. But you don't -- you're not
15 aware that they've testified -- these officers had
16 testified that Fournier had a Taser in his hand, not
17 a gun? Because that's clear, sir, and you don't know
18 that from what I think you just answered.
19 Why do you say those facts are -- that fact
20 at least is skewed?
21 A. You -- you continue to use the word "cover"
22 and suggest that there's cover. I've explained why I
23 think you're fundamentally flawed in your thinking.
24 Q. No.
25 A. And -- and I'm not -- I'm just not going

1 to -- I'll answer your questions as long as you
2 understand that I believe that they are fantastic
3 hypotheticals and not reality.

4 Q. Sir, I'm going to tell you -- you don't --
5 until I just asked you, you didn't know that Fournier
6 did not have a handgun drawn, he had a Taser in his
7 hand.

8 Do you agree? You didn't know that before
9 the few minutes ago.

10 A. I still don't know that to be the case.

11 Q. It's uncontested. I don't know if they'll
12 admit it, but it's uncontested.

13 So it changes your fact pattern, at least,
14 with three handguns drawn to two handguns and one
15 Taser, does it not? If it's true.

16 A. If it's --

17 Q. If it's true.

18 A. If it's true. (Nods head.)

19 MR. MARCHESI: Well, I -- I want to object
20 to the extent that you are suggesting that he has
21 said that there were three handguns drawn. His
22 report will speak for itself.

23 BY MR. LILLEY:

24 Q. Okay. Let's look at it again, because I
25 guess this is going to get longer than I had hoped

1 for.

2 I'm reading at the bottom of the page,
3 "Deputy Mangino could see that Officers Cook and
4 Fournier had their" hand -- gun -- "handguns drawn."

5 Do you see where I'm reading?

6 A. Uh-huh.

7 Q. You have to say yes or no here.

8 A. Yes.

9 Q. And we know there's no dispute that Mangino
10 had his gun drawn. Nobody disputes that.

11 Do you agree?

12 A. I don't believe anyone disputes that.

13 Q. So if that's true, then your statement is
14 wrong, is it not, sir, that Mangino had his gun
15 drawn, we know; Officer Cook had his gun drawn and we
16 know; and Fournier had a Taser, which we all know.

17 Do you accept that?

18 A. I'll accept that for purposes of our
19 discussion. I continue to maintain that your
20 hypothetical is fraught with fantasy.

21 Q. And is that part of the fantasy, that he --
22 Fournier had a gun rather than a Taser?

23 A. No.

24 Q. Okay. What's the part of my -- I've got to
25 know what this fantasy is about because I don't get

1 many of those.

2 What -- what fantasy do you -- do you
3 suggest my -- my hypothetical as?

4 A. Twice after my answer about cover, you've --
5 you continued to use that in your hypothetical
6 questions. I do not accept that any of the officers
7 at any point inside the house had cover --

8 Q. Well, you said cover.

9 A. That's the first -- I did not.

10 Q. You said it was thin cover.

11 A. I did not.

12 Q. You didn't say they had cover?

13 A. I did not.

14 Q. Okay. All right. Let's not -- we don't
15 want to -- let me draw the "we don't want to."

16 Now, Mrs. McKenney, we know, is taken over
17 to a spot somewhere a couple hundred yards, I guess,
18 or I'm not sure which, maybe a hundred yards,
19 somewhere over around the cul-de-sac.

20 Do you know that to be the case?

21 A. Yes.

22 Q. She was taken over there for her safety.

23 Do you know that to be the case?

24 A. I don't dispute that was one of the reasons.

25 Q. Okay. What were the others?

1 A. I don't know.

2 Q. And so she was no longer part of the -- of
3 the -- the scene, at least in terms of -- of someone
4 being possibly shot or hurt in some fashion.

5 Do you agree with that?

6 A. No.

7 Q. So you don't think she was taken the proper
8 place for safety?

9 A. I don't think she was removed from the zone
10 of danger.

11 Q. Okay. You -- you think she should have been
12 removed further away?

13 A. I don't think she was removed from the zone
14 of danger. I haven't really given any consideration
15 to what the other two officers did.

16 Q. Well, you -- you must have if you just told
17 me that you don't think she's in the zone of danger.

18 She's part and parcel of the scene, correct?

19 A. I'm not sure what you mean by that.

20 Q. Okay. Well, put it this way: She is taken
21 from that area and she's taken further away for the
22 purpose of putting her in a safer place, but you
23 don't think it's safe enough.

24 Is that your position?

25 A. I haven't really thought through that

1 particular concept. I can tell you that I don't
2 believe that at the point that she is moved by -- by
3 the cruiser with Officer Fournier, I -- I don't
4 believe that she's out of the realm of danger.

5 Q. Okay. So when Officer Mangino kills
6 Mr. McKenney, you think one of the reasons is that he
7 was protecting her from being further in danger?

8 MR. MARCHESSI: Objection to form.

9 MR. BENJAMIN: Yeah, object to the
10 foundation.

11 THE WITNESS: I'm not sure why you would say
12 that. I -- if I've said something -- you asked if I
13 thought that. I don't know what I've said that's
14 indicated my thinking on that.

15 BY MR. LILLEY:

16 Q. Well, I -- I guess you said she's not out of
17 the -- the realm of danger.

18 What I'm asking you is whether you think
19 that the use of force, deadly force by Mangino, was
20 partially justified in the fact that Mrs. McKenney
21 possibly could -- could get hurt where she was
22 positioned?

23 MR. MARCHESSI: Objection to form and
24 foundation.

25 ///

1 BY MR. LILLEY:

2 Q. Is that what you're saying?

3 A. I'm saying that she certainly was still
4 within the -- in the proximity where she could have
5 been struck by one of Mr. McKenney's bullets.

6 Q. It would be pretty remote, wouldn't it, the
7 fact that she was that far away and the fact that she
8 was in a cruiser in the -- in the way it was
9 positioned and parked? Namely, it was head on or
10 pretty close to head on to where Mr. McKenney was
11 coming out.

12 A. I've not calculated the odds. I don't
13 know --

14 Q. Well, no, no, I'm not saying odds.

15 But it would -- it would -- it would be
16 pretty unlikely, wouldn't it, that she would be hurt?

17 A. I -- I don't know how likely or unlikely.

18 Q. Well, sir --

19 A. I haven't studied the facts with a -- an eye
20 toward assessing a -- a probability.

21 Q. Well, you -- you assess the probability
22 quite -- quite a bit in your report, don't you? You
23 assess the probability that my client was going to
24 shoot or use deadly force against Mr. Mangino. You
25 assess that probability, don't you?

1 MR. MARCHESSI: Objection. Form.

2 THE WITNESS: Again, I -- I've not -- you
3 could say this for any of the possibilities or
4 probabilities. I'm not trying to put a number to
5 them. So to -- to say that something's remote, I
6 don't know.

7 BY MR. LILLEY:

8 Q. Well, I'm not asking for a number, but
9 you -- you get involved all the time with issues
10 called probable cause, don't you, in your career?

11 A. Certainly.

12 Q. Probable don't mean possible.

13 It means probable, doesn't it?

14 A. Yes.

15 Q. More likely than not I think we usually say;
16 is that correct?

17 A. Some uneducated lawyers do.

18 Q. Uneducated?

19 A. Yes, sir.

20 Q. What's your definition of probable cause?

21 A. It's certainly not what you just said.

22 There's a Texas versus Brown, majority of the United
23 States Supreme Court said in the 1960s --

24 Q. Oh, we say it all day long in civil cases in
25 our jurisdiction?

1 A. You may. I'm just telling you, you're --

2 Q. Let's --

3 A. -- dead -- dead wrong on the law as the
4 Supreme Court has articulated.

5 Q. Well, what's the difference between probable
6 cause and possible cause as a person with your
7 background?

8 MR. MARCHESSI: I -- I want to object. I
9 guess I'll just object based on the form of the
10 question.

11 THE WITNESS: Yeah. There are -- there are
12 a few concepts in the law that are more difficult to
13 define than probable cause in the context of whether
14 there's probable cause to search or probable cause to
15 arrest. Nonetheless, we have direction from many,
16 many courts, including the United States Supreme
17 Court, where courts have said that a probability in
18 the terms of probable cause is more than a mere
19 possibility. It is a fair probability. It is
20 certainly not more likely than not and is a
21 relatively generous and low standard.

22 BY MR. LILLEY:

23 Q. But it is not possible cause. It's not
24 something could happen or may happen, correct? It's
25 something is more likely to happen. Do you prefer

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1 that?
2 A. Something more --
3 MR. MARCHESI: Objection.
4 THE WITNESS: -- likely than a mere
5 possibility, sure.
6 BY MR. LILLEY:
7 Q. Sure. So -- but what you've done in this
8 case is you've said that Mangino had the right to
9 shoot Mr. McKenney because possibly he may have,
10 Mr. McKenney, shot Mr. Mangino, and Mr. Mangino -- do
11 you agree with that?
12 A. I agree that you characterized what I've he
13 said that way.
14 Q. No. I'm -- do you agree with the
15 characterization that you have said in this case that
16 Mr. McKenney was shot because of the possibility that
17 Mr. McKenney may have turned his gun on Mr. Mangino?
18 In other words, you said that, did you not?
19 A. I've said in this case that one of the
20 significant factors in Deputy Mangino's decision to
21 fire was the proximity and the armament and the
22 comportment of Mr. McKenney.
23 Q. But you said more than that. You said the
24 fact that he could possibly kill him. As Mr. Mangino
25 testified, he said, I was afraid he might kill me. I

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1 was afraid he was possibly going to kill me. I
2 didn't know what was going to happen. All of those
3 have been said by him.
4 MR. MARCHESI: Well --
5 BY MR. LILLEY:
6 Q. Those are -- those are contingencies, aren't
7 they, guessing on what this person might rather than
8 what he probably will do?
9 MR. MARCHESI: I'm going to object to the
10 form of the question because you --
11 MR. LILLEY: That's fine. Object to the
12 form. It's --
13 MR. MARCHESI: No, excuse me.
14 MR. LILLEY: -- as far as you can go.
15 MR. MARCHESI: Excuse me, Mr. Lilley. You
16 started the question by asking what this witness had
17 said and then you shifted to what others had said.
18 So if you want to ask this --
19 MR. LILLEY: Okay.
20 MR. MARCHESI: -- this witness what he said,
21 do that. If you want to ask him his understanding as
22 to what others have said, ask him that.
23 But please be clear because the prior
24 question --
25 MR. LILLEY: Those are not -- those

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1 objections are inappropriate.
2 MR. MARCHESI: Well --
3 MR. LILLEY: The only objection you're
4 permitted to do, and I've told you this so many
5 occasions, is to object to the form and that would
6 cover that.
7 MR. MARCHESI: I appreciate your counsel,
8 Mr. Lilley --
9 MR. LILLEY: Well --
10 MR. MARCHESI: -- my objection stands
11 nonetheless.
12 MR. LILLEY: Okay.
13 BY MR. LILLEY:
14 Q. Well, then let's look at what Mr. Mangino
15 said.
16 You've looked at his deposition, have you
17 not?
18 A. I have.
19 Q. I'm going to have to dig this out. Let --
20 let me do this after lunch, because I don't want to
21 waste time. Let's continue with your report, and
22 then I'll come back to what Mr. Mangino said with
23 regard to probable cause, possibly, maybe, might, I
24 don't know. I'll dig that out for you, his exact
25 words. Okay?

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1 Let's go back to your -- your report. I'm
2 still on page 3. Let's just -- again, this may be
3 nuanced, and I don't want to nitpick here, but let's
4 look at the last paragraph of your report, and you
5 said it earlier in the answer you gave to one of my
6 questions.
7 "Deputy Mangino could see that Officer Cook
8 and Fournier had their handguns drawn. The officers
9 and Stephen McKenney were in a dark passageway."
10 Where do you get the impression that it was
11 a dark passageway?
12 A. From information in one of the reports that
13 indicated it was a low-light situation.
14 Q. Right. It wasn't dark, was it, sir? I
15 mean, again, you -- are you putting a spin on that?
16 I mean, with all due respect, dark versus it wasn't
17 well lit is -- is a nuance that suggests something
18 that isn't true, doesn't it, in this case?
19 A. No.
20 MR. MARCHESI: Object to form.
21 BY MR. LILLEY:
22 Q. Okay. Now, you say -- let's move on to your
23 next page here, page 4.
24 And I think you made reference to it before,
25 you say, "Deputy Mangino urged the officers, Cook and

<p>Page 125</p> <p>1 Fournier, to back out of the house to achieve a more 2 tactically sound position."</p> <p>3 Now, that's what officers are taught to do, 4 correct? When you're in a situation like this, if 5 you can do it.</p> <p>6 A. To achieve a more tactically sound position, 7 yes.</p> <p>8 Q. You're trying to turn the advantage, if 9 there is an advantage, of the -- of the subject or 10 the -- the suspect, we'll call -- a subject, I guess. 11 You're trying to turn that around in favor of the 12 officer, are you not? That's what they're trained to 13 do.</p> <p>14 A. They're trained to -- to mitigate the -- the 15 risk, to --</p> <p>16 Q. Yeah.</p> <p>17 A. I don't know that I -- I never heard it 18 expressed in -- in gain the advantage, but they're -- 19 they're certainly trained to do what they can to 20 mitigate the danger.</p> <p>21 Q. Well, if they mitigate the danger enough, 22 they may turn the things around till they have the 23 advantage rather than the suspect, right?</p> <p>24 A. That's certainly true.</p> <p>25 Q. Okay. And one of the things they did and do</p>	<p>1 and are taught to do, all of the above, is to try to 2 put some distance between them and the suspect, as in 3 this case, correct?</p> <p>4 A. Officers, that's -- that's a current general 5 proposition, yes.</p> <p>6 Q. And -- and when they do that, they increase 7 their odds and decrease their risks, do they not? 8 When they just simply put a hundred feet, let's say 9 in this case, or approximately a hundred feet, 10 between the suspect and Mr. Mangino, correct?</p> <p>11 A. Typically, yes.</p> <p>12 Q. And the other things they do, as they try 13 to -- to -- in order to gain an advantage or mitigate 14 the -- the risk, as you say, they try to get a 15 firearm that is much more effective than the 16 suspect's firearm.</p> <p>17 Fair statement?</p> <p>18 A. It's generally not a calculation of 19 balancing efficiencies of weapons, but they -- the 20 officers are taught in certain circumstances, 21 particularly those circumstances where events will 22 transpire at some distance, to transition from a 23 handgun to a long gun.</p> <p>24 Q. Because a long gun is far more accurate than 25 a -- than a pistol at, let's say, a hundred feet,</p>
<p>Page 127</p> <p>1 isn't it?</p> <p>2 A. Accuracy is one of the principal concerns 3 for that transition.</p> <p>4 Q. And when you put a hundred feet to 70 to a 5 hundred feet between you and you get your long gun 6 out -- is it an assault weapon? I never know what 7 that --</p> <p>8 A. I -- I think CNBC and MSNBC --</p> <p>9 Q. I'm not talking about television.</p> <p>10 Is it an assault weapon in your view?</p> <p>11 A. I don't use that term, but I -- I --</p> <p>12 Q. Okay.</p> <p>13 A. It's certainly one you hear Brian Williams 14 use on television.</p> <p>15 Q. He is back, I guess, isn't he?</p> <p>16 A. He's back.</p> <p>17 Q. Yeah, the -- but, in -- in fact, you know 18 that the advantage goes to the police officer who can 19 get his firearm and it's a -- it's a rifle with a 20 sight versus somebody who's got a pistol in his hand, 21 whatever the make is, or whatever size it is, who's 22 some hundred feet away who may have to shoot at the 23 officer.</p> <p>24 Fair statement?</p> <p>25 A. Typically, the person with the rifle has the</p>	<p>Page 128</p> <p>1 ballistic advantage.</p> <p>2 Q. Okay. So now with regard to Mangino, we 3 have two advantages that he has created, quite to his 4 credit. He's put distance between him which is -- 5 helps him get more of an advantage, or mitigate his 6 risk as you say, and he's -- he's got his rifle out, 7 which is going to be more accurate than the 8 suspect's.</p> <p>9 Right so far?</p> <p>10 A. I believe that it -- it's going to be more 11 accurate. I have no reason to believe it wouldn't 12 be.</p> <p>13 Q. Well, you know that -- that the training 14 with -- with firearms, that pistols are not very 15 accurate at a distance of over 50 feet, don't you?</p> <p>16 A. With a typical shooter and a typical pistol, 17 that's true.</p> <p>18 Q. And rifles are, however, very accurate at 19 50 feet.</p> <p>20 Do you agree with that?</p> <p>21 A. Again, same qualifications, but as a general 22 proposition, absolutely.</p> <p>23 Q. So -- so the -- the mitigation of risk 24 works, at least in those two instances in this case, 25 do they not? They did?</p>

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1 A. They're both -- they're both risk
2 mitigators, or as you put them, advantage makers,
3 yes.

4 Q. And then you -- and then you've got the
5 thing called cover. A cover is where the officer
6 seeks and finds a place to hide, if you will, so that
7 the suspect either can't know where he is or will
8 have a hard time shooting him because he's behind
9 a -- a rather beefy cover.

10 Do you agree?

11 MR. MARCHESI: Objection to form.

12 BY MR. LILLEY:

13 Q. When I say "beefy," I'm talking about the
14 engine of his car, as he points out.

15 MR. MARCHESI: Same objection.

16 BY MR. LILLEY:

17 Q. That's certainly an advantage when you can
18 get behind cover of that nature and the suspect is
19 standing out in the middle of the driveway.

20 Do you agree?

21 MR. MARCHESI: Objection. Form.

22 THE WITNESS: I -- I agree with the latter
23 part of that, that -- that the engine block of a
24 typical vehicle does in fact provide several linear
25 feet, surface area, that are effective cover against

1 a typical handgun bullet.

2 BY MR. LILLEY:

3 Q. And so now you've got an officer who's not
4 only put the distance in there in between them and
5 increased his advantage by his rifle, but he's under
6 cover.

7 He's actually behind something that could
8 stop a .357 bullet, correct?

9 MR. MARCHESI: Objection. Form.

10 THE WITNESS: I don't agree that he's under
11 cover. I agree that he is behind something that has
12 several linear feet of ability to stop or deflect a
13 .357 caliber projectile.

14 BY MR. LILLEY:

15 Q. You don't think that was pretty good cover?

16 A. It's not being under cover, no.

17 Q. Well, what do you define as being
18 undercover? I mean, I -- I -- I'm not sure I know
19 where you're going with that, but what do you define
20 as being undercover?

21 A. Well, the -- the term, isn't -- it's not
22 really just a term of art. I mean, at least in the
23 law enforcement world has a quite well-defined
24 meaning. And cover is something that will stop
25 bullets. If someone's behind an -- an engine block,

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1 officers actually, at -- at least in -- in this state
2 and others that I've seen, I'm not sure about Maine,
3 but officers are trained to defeat that kind of
4 cover, when suspects take that kind of cover. If one
5 is behind an engine block, one can't return fire, for
6 example. An engine block is never -- never complete
7 cover for a person.

8 Q. Well -- okay. Right. You finished?

9 A. It's just not.

10 Q. Well, it may not be complete, but it's
11 pretty darn good, isn't it? An engine block between
12 you and the suspect who's out there some hundred feet
13 or so away, at least to start, with a handgun in the
14 wide open driveway? You've increased your advantage
15 substantially at that point given the fact of
16 distance, cover, and a more accurate firearm, have
17 you not?

18 A. At -- at that distance in those
19 circumstances, the engine block is a -- is a --
20 provides a pretty good piece of cover.

21 Q. You've got -- you've got a lot of cover and
22 a lot more advantage than -- than the -- the shooter
23 who's walking down the driveway with a pistol and
24 absolutely open spaces, have you not?

25 A. You have a lot more cover than the shooter.

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1 Q. So at this particular point, you also know,
2 don't you, that -- and the studies show, you --
3 you -- you cite, I think, a person by the name of, is
4 it Tueller?

5 A. Yes.

6 Q. Did you -- and you've -- you've gone to some
7 of his classes and been certified by him? Or
8 something?

9 A. I don't know that I'd use the word
10 "certification." I don't think that Mr. Tueller
11 teaches classes that carry the certification element,
12 but I have --

13 Q. Okay.

14 A. -- taught with him and been taught by him on
15 many occasions over the years.

16 Q. Okay. You certainly know that one of the
17 other factors that gives Mangino the advantage,
18 probably throughout this, but certainly in this
19 situation, is his age versus the age of the -- of
20 the -- of the suspect, or the subject let's call him,
21 as -- as Mr. Tueller points out in some of his
22 articles.

23 MR. MARCHESI: Objection --

24 BY MR. LILLEY:

25 Q. You agree? Young man, old man.

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1 MR. MARCHESI: Objection. Form.
2 THE WITNESS: I don't agree.
3 BY MR. LILLEY:
4 Q. You don't agree that Mr. Tueller has
5 suggested that age, that the person who is holding
6 the suspect holding a gun, if he's 25 years old or if
7 he's 65 years old is more likely to be able to shoot
8 faster when he's 25 years old than when he's 65 years
9 old? Do you agree with that? Because that's what I
10 read actually Tueller --
11 A. I -- I don't know that Mr. Tueller has ever
12 made that precise statement. Your question began
13 with the specifics about these two individuals, and I
14 don't know that to be the case, nor do I believe it
15 to be the case as a general proposition.
16 Q. You don't know what to be the case? That --
17 that -- that the victim wasn't twice as old as the
18 police officer?
19 A. I don't know that in this particular case,
20 that age is a significant factor and advantage or
21 disadvantage.
22 Q. Well, I mean with all due respect, I'm not
23 going to ask you your age, but baseball players and
24 other sports people kind of quit playing in their 30s
25 sometimes, oftentimes because they're not as agile,

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1 as strong and as quick as they were in their 20s.
2 Do you agree with that general proposition?
3 MR. MARCHESI: Objection.
4 THE WITNESS: Yes.
5 BY MR. LILLEY:
6 Q. Well, doesn't it stand to reason, sir, that
7 at least from the age point of view, Mr. Mangino had
8 the advantage from the start?
9 A. I -- I think that generally, that's probably
10 true. Whether it's specifically true in this case or
11 not, I do not --
12 Q. Well, no, I -- I understand that. We're --
13 we're taking the general. We're taking the norm.
14 We're trying -- not trying to go around the edges,
15 but we know it's a proper -- okay. Withdraw that
16 comment.
17 And in terms of the firearms, which I forgot
18 to mention, we don't know -- well, we know now that
19 the firearm that -- that -- that the suspect had,
20 contained -- well, it -- it was capable of six shots,
21 correct, the -- the .357?
22 A. I believe that it's capable of firing six
23 rounds without reloading.
24 Q. And we know that Mangino had what I call a
25 clip. I guess -- what do you call the things that

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1 you put in there that -- that hold the bullets,
2 magazines?
3 A. Proper term would be magazine.
4 Q. A magazine containing 30 bullets, did he
5 not?
6 A. He had a 30-round magazine. I -- I suspect
7 he didn't have 30 rounds in it.
8 Q. Well, I think he said he did, but --
9 A. He may have.
10 Q. But in any event, we'll -- we'll leave that
11 for him to ...
12 So even in terms of the number of bullets,
13 Mangino certainly had the advantage there, did he
14 not?
15 MR. MARCHESI: Objection. Form.
16 THE WITNESS: Assuming proper functioning of
17 both weapons, Deputy Mangino's rifle was capable of
18 firing more rounds without the manual act of
19 reloading than the revolver was capable of firing.
20 BY MR. LILLEY:
21 Q. And to that extent, he had an advantage
22 because of that, correct?
23 A. Yes.
24 Q. Now, in addition to that, we know there are
25 at least two other police officers in the area, do we

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1 not? During the time of the shooting.
2 A. Yes.
3 Q. And although you called it a loose
4 perimeter, I think -- I'll get to that in your
5 report.
6 Do you remember calling it a loose
7 perimeter?
8 A. I don't.
9 Q. I'll -- I'll look it up for you.
10 It is a perimeter. You -- correct?
11 MR. MARCHESI: Objection. Form.
12 THE WITNESS: When we get to that point, I
13 suppose you can talk about definitions, but there
14 is --
15 BY MR. LILLEY:
16 Q. I'll take it out if you want. Go ahead.
17 A. I'm sorry. There -- there is some element
18 of perimeter.
19 Q. And -- and -- so perimeter is not really
20 relevant to this whole case anyway, is it?
21 MR. MARCHESI: Objection.
22 BY MR. LILLEY:
23 Q. Let me add to the question.
24 Since Mr. Mangino -- Mr. McKenney never
25 exceeded the perimeter, such as it was, it's not

1 really relevant to your findings, is it?

2 A. The -- the concept of a perimeter of
3 containment is not really relevant here because
4 Mr. Mangino -- excuse me, Mr. McKenney never -- never
5 leaves the immediate area.

6 Q. Okay.

7 A. So in that -- that respect, I have to agree
8 with you.

9 Q. Okay. And you understand that Mr. Mangino,
10 according to the attorney general's report, from all
11 the evidence they found, including their -- the radio
12 communication, made no commands to Mr. McKenney from
13 the time Mr. McKenney was up -- outside the garage
14 for a time frame of 6 minutes and 25 seconds until
15 the shots were fired. That was their finding.

16 Do you know that to be the case?

17 MR. MARCHESI: Objection.

18 THE WITNESS: I don't recall how they -- how
19 they put it. I agree with you that -- that they were
20 unable to find any audio recording of any warnings
21 for a period of time. If you say it was six minutes,
22 I -- it -- it -- I thought it was --

23 BY MR. LILLEY:

24 Q. 6.25.

25 A. Yeah, that sounds correct.

1 Q. And it's advisable, isn't it, if possible --

2 you -- you teach this, don't you, to give commands to
3 people like Mr. McKenney to -- to drop the weapon
4 or -- well, drop the weapon or I'll shoot or some
5 kind of commands to -- to try to persuade him to
6 stop? Do you agree that that's what you teach?

7 A. The better command and the typical command
8 would be quite simply, Drop the weapon or drop the
9 gun.

10 Q. Well, it might be simple, but it might be
11 more effective if you said, Drop the gun or I'll blow
12 your head off, wouldn't it?

13 A. There's substantial evidence to the
14 contrary.

15 Q. Oh, there is? Okay.

16 But either one, nothing was said, at least
17 from the AG's investigation, for 6 minutes and
18 25 seconds by Mr. Mangino.

19 MR. MARCHESI: I -- I -- object --
20 BY MR. LILLEY:

21 Q. Do you agree?

22 MR. MARCHESI: I -- excuse me. I object --
23 BY MR. LILLEY:

24 Q. You don't agree?

25 MR. MARCHESI: -- that completely misstates

1 the attorney general's conclusions.

2 Now, if you want --

3 BY MR. LILLEY:

4 Q. Do you agree that if that's true, that
5 that's an exceedingly long time for Mr. Mangino not
6 to give this man some warning of what he should do or
7 perhaps the consequences of what if he doesn't do it
8 might occur?

9 MR. MARCHESI: Object to the form of the
10 question. Misstates the record.

11 THE WITNESS: Again, I -- I'm -- I'm not
12 sure she got it on the record. I didn't agree with
13 your last -- the -- the answer to your last question
14 is no, I don't agree. I still don't agree --

15 BY MR. LILLEY:

16 Q. Don't agree to what?

17 A. That -- that you accurately stated the
18 facts.

19 However, in -- in the hypothetical that
20 there was 6 minutes and 25 seconds with no
21 communication whatsoever, recorded or not, generally,
22 that -- that's an -- an unduly long period of time.
23 There may well be circumstances in which that's
24 appropriate. In this case, I would see nothing that
25 would have -- that would have made it appropriate.

1 So if your hypothetical were true, I would
2 agree that that probably was not appropriate.

3 VIDEOGRAPHER: Nine minutes remaining.

4 BY MR. LILLEY:

5 Q. And let me ask you something: When you
6 looked over the facts and looked over the -- the --
7 the videotapes and -- and you looked at -- and you
8 heard all the witnesses -- I say heard or saw their
9 testimony, do you understand that Mr. McKenney,
10 the -- the subject, never pointed his gun anywhere
11 but to the ground as he was walking toward Mangino?

12 MR. MARCHESI: Object to form.

13 THE WITNESS: No.

14 BY MR. LILLEY:

15 Q. You don't agree to that?

16 A. No.

17 Q. What do you point to that would suggest
18 otherwise?

19 A. The record.

20 Q. Well, you've got to be more specific than
21 that.

22 A. Statements in the record, statements from
23 officers telling Deputy Mangino that they thought
24 that Mr. McKenney was targeting him, statements from
25 Deputy Mangino and my viewing of the video when I can

1 plainly see that what you have just said is simply
2 not true.

3 Q. What did you see in the video that you -- to
4 support that answer?

5 A. Mr. McKenney raising the firearm, pointing
6 the firearm directly down range and not at the ground
7 as you suggest might be the case.

8 Q. Well, that's back at the house. I'm talking
9 about when he left the house, walking down the
10 driveway.

11 Is there any evidence that he ever pointed
12 the gun anywhere but to the ground?

13 A. I haven't seen anything in the record
14 that -- that can demonstrate to me --

15 Q. So in order -- okay. I'm sorry.

16 A. That he's pointed the weapon directly at --
17 at Deputy Mangino.

18 Q. Or even in his direction.

19 A. I don't know that to be the case.

20 Q. Well, is there any evidence you can point to
21 that he pointed his gun anywhere but to the ground
22 after he left the -- the -- the structure and
23 started -- as -- as Mr. Mangino said, nonchalantly
24 walked down the driveway with a gun dangling from his
25 arm.

1 A. After the point that he's -- that
2 Deputy Mangino hears the radio communication that
3 he -- that -- I believe it was Officer Fournier, I
4 may be mistaken, believes that Deputy Mangino was
5 targeted, as he's moving down the driveway, no.

6 Q. Sir, I'm talking about after -- when the --
7 when -- when -- you're changing my question.

8 I'm trying to get you to address the issue
9 of when -- when the suspect left the house area and
10 started walking down the driveway, nonchalantly,
11 quote/unquote, with a gun dangling by his side.

12 Do you have any evidence that he ever moved
13 the gun in any other -- other fashion?

14 A. No.

15 MR. LILLEY: Okay. I'm going to move on to
16 a little other area, so I think we'll quit right now.
17 Thank you for your patience.

18 VIDEOGRAPHER: This is the conclusion of
19 Disc 2. The time is 12:06. We're going off the
20 record.

21 (Break taken for lunch.)

22 VIDEOGRAPHER: This is Tape No. 3 in the
23 videotaped deposition of Kenneth Wallentine. The
24 time is 1:14. We're back on the record.
25 ///

1 BY MR. LILLEY:

2 Q. Mr. Wallentine, before lunch, we were
3 talking about your deposition -- your deposition,
4 with -- your report. And I think I was around
5 page 5, or at least that's where I want to go. We
6 have talked about page 4 and I was going to page 5.
7 If you'd -- are you on page 5?

8 A. It's open to page 5, so I think that's where
9 you left off.

10 Q. Okay. We -- we've talked about this before,
11 but let me read something to you and then ask you to
12 look at a couple of other documents.

13 On the beginning of the top paragraph --
14 beginning of the paragraph on top, I should say, it
15 says, "Stephen McKenney advanced toward
16 Deputy Mangino."

17 Let -- let me just stop for a second. You
18 agree, do you not, that McKenney is walking down his
19 driveway?

20 A. Yes.

21 Q. And Mangino -- you keep saying advancing
22 toward him.

23 Mangino is off to the side of the driveway,
24 behind his vehicle, correct? I'll show you some
25 pictures.

1 A. Yeah, it's -- it's to the side of the --
2 yes.

3 Q. If -- if -- I'll -- my point is this: If
4 McKenney kept walking and hadn't been shot, he would
5 walk down to the end and out his driveway, not
6 exactly toward Mangino necessarily.

7 Do you agree?

8 A. I'm not sure what -- I -- I don't know
9 whether if he continued straight, he'd end up in the
10 street or not, but I don't think that he was walking
11 directly toward the deputy at that particular point.

12 Q. Well, I mean, he -- and -- and -- and by the
13 way, that was his driveway, right? He was lawfully
14 on the driveway.

15 A. I -- sure. It's -- I think it's a common
16 driveway.

17 Q. Right.

18 A. But I -- I don't contest that he had any
19 right to be there.

20 Q. He had a legal right to be on the driveway.

21 A. Sure.

22 Q. And he had a legal right to have a handgun,
23 did he not?

24 A. Don't know Maine -- I -- I don't know of any
25 reason under Maine law that he wouldn't.

<p>Page 145</p> <p>1 Q. How about federal law, like the Second 2 Amendment? 3 A. Nah, I don't think he -- I have seen nothing 4 in this case to suggest that his gun rights were 5 restricted by state or federal law. 6 Q. Therefore, he was legal in possessing a gun 7 by his side, dangling it, and walking down his own 8 driveway; fair statement? 9 A. Sure. As a general rule, yes. 10 Q. And he -- you understand, do you not, that 11 he was not suspected of having fled any crime scene? 12 A. I don't believe so. 13 Q. And to your knowledge, that if anybody 14 checked, he had no criminal record. 15 Did you know that to be the case? 16 A. I don't know that, but I believe that, and 17 I'm not sure why I believe that. I -- I -- there may 18 be something in the record that suggested to me that 19 he had no criminal record. 20 Q. Well, I'll suggest to you that he had no 21 criminal record, and I don't think these folks will 22 object. 23 A. Yeah. 24 Q. They might, but I don't think so. 25 A. I think he'd been a school bus driver.</p>	<p>Page 146</p> <p>1 Q. That's not a crime, is it? 2 A. No, but it's indicative that he wouldn't 3 have a criminal record. 4 Q. Okay. Good. 5 So at least as -- in -- in -- in driving -- 6 in walking down the driveway, as it were, prior to 7 him being shot, he was doing nothing illegally, was 8 he? Or had not done anything illegal. 9 A. Yeah, I -- I don't know that I considered 10 all of the prior conduct, but at that -- at that 11 moment, I think it's a fair argument that he wasn't 12 committing a crime. 13 Q. It's a fair argument. You won't concede to 14 it? 15 A. It's not something that I've explored all of 16 the nuances and run it to ground, but I -- I think 17 you're right. 18 Q. Well, I mean for -- I'm just trying to close 19 the door on this. 20 I mean, for instance, you wouldn't have 21 probable cause to charge him with a crime before he 22 got shot. 23 A. Not based on what I know. And I'm -- I'm 24 just trying to think of it now as a prosecutor. 25 Q. Okay. Or as a police officer.</p>
<p>Page 147</p> <p>1 A. Sure. 2 Q. That term is used by all of us. 3 A. Yes. 4 Q. And you have -- wear two hats, so you use it 5 in two capacities I -- I suspect; correct? 6 A. (Nods head.) 7 Q. Is that right? 8 A. Yes. 9 Q. Let's look at page 5, if we can. 10 A. Okay. 11 Q. And I just read something there that talked 12 about Deputy Mangino commanded and pleaded with 13 McKenney to drop his gun. I didn't see anything in 14 the record about him pleading. 15 Did -- where did you get that? Do you know? 16 I understood he told him to drop the gun when he was 17 up at the house. But pleading? Is that a word of 18 art or just -- 19 A. No, not necessarily. I don't recall whether 20 that was a term that was used in the interview or -- 21 or not, but I -- I don't recall, sir, where I -- 22 Q. Okay. 23 A. -- what -- what is the source of my word 24 choice there. 25 Q. And then you say, "McKenney looked toward</p>	<p>Page 148</p> <p>1 Deputy Mangino as Deputy Mangino shouted at least ten 2 times for McKenney to drop his gun." 3 Did I read that right? 4 A. Yes. 5 Q. Now, if I -- if you look in -- I've -- let 6 me just see if I can get it here. Get it 7 straightened out. 8 If you look in that same book, I hope, 9 you'll find -- 10 A. The first half? 11 Q. Yeah, the first -- just open to page 1 in 12 the first, which should be the AG's report. 13 Is it? 14 A. It's -- 15 Q. The AG. 16 A. Mine's a lot thicker, but I think this just 17 probably doesn't have all the exhibits. 18 Q. Okay. But in any event page 1 -- let me 19 find it myself -- is the office of the attorney 20 general. It's a report on the use of deadly force by 21 Cumberland County Deputy Sheriff on April 12, 2014, 22 for the record, in Windham, correct? 23 A. Yes. 24 Q. Now, if you'd turn to page -- I believe it's 25 32 in that report.</p>

1 Do you see where the attorney general, as I
2 suggested in an earlier question that I was
3 challenged on, I believe, do you see where the
4 findings in that last paragraph, or some of the
5 findings at least of the attorney general's office
6 talks about time on -- after 1434?

7 A. Yes, sir.

8 Q. And it says -- in addition to the fact that
9 apparently the tape ran for a while, it -- it talks
10 about the specific time frames, one, two, three, and
11 four.

12 Do you see that?

13 A. Yes.

14 Q. It says, "It was 6 minutes and
15 25 seconds" -- I think that's 25.

16 A. Yes, sir.

17 Q. -- "from the last command made by
18 Deputy Mangino to Stephen McKenney for him to disarm
19 until the sound of the first report of Mangino's long
20 gun."

21 Did I read that right?

22 A. Yes.

23 Q. Do you disagree with that finding by the
24 AG's investigator?

25 A. I disagree with it in the -- in -- insofar

1 as that -- excuse me -- that one statement is
2 represented to be accurate. I don't disagree in
3 context.

4 Q. Well -- well, sir, what context do you need?
5 This is the context of -- let me withdraw the
6 question and rephrase it.

7 This is in the context of -- of timing from
8 at least the evidence that the attorney general had
9 when they exonerated Mr. Mangino, I -- I guess, from
10 at least criminal liability. This was their
11 conclusion of their investigation, that he made no
12 commands to -- from -- to Mr. McKenney for
13 6.25 seconds.

14 Is there any context that you think has to
15 be added to that to make it more accurate?

16 A. Yes.

17 Q. And what would that be?

18 A. The entire document -- excuse me. I don't
19 know if I'm catching or finishing a cold, or both
20 actually.

21 The entire document is titled "Highlights
22 PO" -- police officer -- "James Cook WatchGuard WPD
23 Unit 12."

24 I -- I'm confident that what that means is
25 that it's the WatchGuard dash camera recording

1 system. And so the context is that this particular
2 document is examining and reporting and giving
3 findings on what can be distinguished and identified
4 and heard on the audio track of the WatchGuard
5 audio/video recording system.

6 Q. Okay. And -- but this is done, then, by
7 Detective Michael Pulire I guess it is. I don't
8 know --

9 MR. MARCHESI: Pulire.

10 THE WITNESS: Pulire.

11 MR. LILLEY: Pulire. Yes, Of course, that's
12 what I was going to say.

13 BY MR. LILLEY:

14 Q. Anyway, he's the -- he's the attorney
15 general investigator, and these -- that is -- that's
16 a conclusion at least he's raised, correct?

17 MR. MARCHESI: Object to the form.

18 BY MR. LILLEY:

19 Q. I mean, appears to be. It's in his report.

20 A. That -- that's what it appears to be.

21 Q. Okay. And then it says it was 9 seconds
22 from the time police Officer Fournier radioed that
23 Steve was advancing on the -- Deputy Mangino until
24 the sound of the first report of Mangino's long gun.

25 Do you take any issue with that?

1 A. I don't.

2 Q. Okay. Then -- then let's go back a little.

3 So what you're saying is, is that the AG's
4 investigator coming to that decision is basing it
5 only on, in -- in your view at least, the -- the
6 WatchGuard radio system; is that correct?

7 A. It's my understanding that this -- this
8 document -- this portion of the attorney general
9 investigation focuses solely on and is exclusively
10 related to that which may be heard from the audio
11 track of the WatchGuard audio/video recording system
12 that was in Officer Cook's -- inside his vehicle.

13 Q. Well, it --

14 A. That's my understanding.

15 Q. Apart from speculating that there may be
16 other evidence, do you really have any evidence that
17 there was other evidence of his commanding this
18 subject?

19 A. Yes.

20 MR. MARCHESI: Objection to form.

21 BY MR. LILLEY:

22 Q. And what is the other evidence?

23 A. I was -- excuse me, statements from
24 Deputy Mangino that he continued to give commands to
25 drop the weapon, statements from Officer -- is it

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1 officer or sergeant? But I think it's
2 Officer MacVane that he heard shouting that he
3 believed to be Deputy Mangino telling Mr. McKenney to
4 drop the gun that do not appear --

5 Q. Okay.

6 A. -- to be memorialized in this particular
7 document.

8 Q. But MacVane said that when he -- when he
9 hears those kind of things, it's sometimes is out of
10 habit rather than out of reality.

11 Did you read that in his deposition?

12 A. I did.

13 Q. So that kind of gives one pause, doesn't it,
14 to say whether he really heard or it was something he
15 expected to hear?

16 MR. MARCHESI: Objection to form.

17 THE WITNESS: You know, I suppose -- I
18 suppose one could say that. I -- I don't know.

19 BY MR. LILLEY:

20 Q. Well, let me ask you this: Do you make
21 credibility decisions when you testify as an expert
22 as to who's telling the truth and -- or who's more
23 accurate than -- than other witnesses?

24 A. I don't -- I don't think that one could
25 completely escape credibility assessments.

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1 Q. Okay. And so other than MacVane and the
2 person who's essentially on the hot seat here,
3 Mr. Mangino who says he did, you're willing to
4 suggest that that would be evidence that would
5 contradict the AG's investigation?

6 MR. MARCHESI: Objection to form.

7 THE WITNESS: No.

8 BY MR. LILLEY:

9 Q. Let's move on to the -- the -- the other
10 issue that I -- I think I had marked there. I --

11 A. There was another tab -- another Post-it --

12 Q. Yeah.

13 A. -- note here, page 35.

14 Q. Okay. I was trying to get some of those
15 facts out if I could. Oh, that was -- that was 32.

16 A. You -- you were on page 32. This other
17 Post-it note is on page 35.

18 Q. Okay. I'd like to have you look at
19 page 30 -- 35? What have I got there? Still have
20 jetlag. Thirty-five.

21 Q. Okay. Let's look at page -- to wrap this
22 sequence up, at page 37, which is the Windham Police
23 Department log for Officer James Cook MVR Camera.

24 Do you know what that means?

25 A. Yes.

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1 Q. If you look down at the entry of 622:17, do
2 you see where I am, second from the bottom?

3 A. Yes.

4 Q. And you can read above it if you wish,
5 but -- probably should start above it, the next
6 paragraph of 621:19. W12 and W26.

7 Do you know the -- I'll -- I'll represent to
8 you those are Windham police officers.

9 A. I -- I believe the W12 was Cook and W26 was
10 Fournier.

11 Q. Okay. I think you're quite right.

12 They speak with Vicki McKenney at the
13 entrance to the garage, and they get information
14 about the suspect's location, firearms, background.
15 And W12 asked dispatch for responding deputy's
16 location, which I think would mean Mangino.

17 Do you agree? Fair reading of that?

18 A. I believe so.

19 Q. And then the next two entries are what I'm
20 mostly concerned about. 622:20 -- 622, rather, :17
21 says, CTY27 arrives.

22 That's Mangino, right?

23 A. Yes.

24 Q. The three officers devise their approach.

25 Do you see where I'm reading?

1 A. I do.

2 Q. And when I said they had a plan, that's what
3 I was referring to.

4 A. All right.

5 Q. So do you take any issue with the -- with
6 the transmissions here that seem to suggest that?

7 MR. MARCHESI: Objet to form.

8 BY MR. LILLEY:

9 Q. In terms of its credibility?

10 A. I -- I -- I don't. I don't think these are
11 actual transmissions. I believe these are
12 Sergeant Boudreau's --

13 Q. Okay.

14 A. -- conclusions as he listened to the
15 transmissions.

16 Q. Do you have any reason to -- to believe that
17 they have -- they're not credible?

18 A. I -- I don't.

19 Q. Okay. Then the next one is 622:46. W12
20 asks W26 to prepare his Taser.

21 Do you see that?

22 A. I do.

23 Q. All three entered through the entrance at
24 the rear of the garage. W12 announces police
25 department, and W26 calls out for Stephen to come

1 out.

2 So do you still question my recitation of
3 the facts that, in fact, the device or the -- the
4 plan that was devised and carried out was that
5 Fournier was going to go in and did go in with his
6 Taser rather than his firearm?

7 A. I don't question what you just said.

8 Q. And just -- also let me ask you this: Do
9 you recall that when they did go in, whatever
10 happened inside, they told Stephen two things: One,
11 that they were -- they were going to help him; and
12 two, that they were going to call him. And I -- you
13 can -- you flipped to the next page quite
14 appropriately. It's on the top.

15 MR. BENJAMIN: I'll object if you're saying
16 that's the only two things they told him.

17 MR. MARCHESI: Join.

18 THE WITNESS: I --

19 MR. LILLEY: I'm not saying it's the only
20 two things. I said --

21 MR. BENJAMIN: You said they told him two
22 things.

23 MR. LILLEY: I said they told him two
24 things. They may have told him other things. I'm
25 talking about those two things.

1 stuff.

2 But I'm interested in the two things they
3 told him so that at least we get an idea of the words
4 they used to the deceased.

5 A. I -- I don't recall the exact words. I do
6 recall one of the officers saying something like,
7 Stephen, we're here to help you; we want to get you
8 some help.

9 Q. Okay. At least the transmission, according
10 to this gentleman here, indicates he told him to put
11 the gun down and that he wants to get Stephen some
12 help.

13 Do you see that?

14 A. I see it now.

15 Q. So do you take any issue with the
16 credibility of that statement?

17 A. No. I believe that's what was said.

18 Q. Okay. And then on the next paragraph, after
19 said -- 27 says back out, I'm interested in the next
20 one. W12 tells Stephen that they're going back
21 outside and they will call him in a moment.

22 Do you see that?

23 A. I do.

24 Q. And so do you think that's credible?

25 A. I believe that's accurate.

1 BY MR. LILLEY:

2 Q. Do you agree?

3 MR. BENJAMIN: All right. Thanks for
4 clarifying that.

5 THE WITNESS: I -- I don't remember that
6 exact -- I -- I remember having something different.
7 So --

8 BY MR. LILLEY:

9 Q. Well --

10 A. -- if you want I can look at this.

11 Q. Well, yes, I want you -- do you think
12 there's any suspect that this is not credible?

13 A. No. I'm saying I -- I remember them saying
14 something slightly different inside the house.

15 Q. Well --

16 A. Okay. You know, you're right. I -- when
17 you said call him, in my mind, I thought -- I was
18 thinking call out, but I -- I think you're referring
19 to telephone, and that's what I think happened, that
20 that was their intent and their effort.

21 Q. Right. But the only two -- he said there
22 were other things said, but I'm not --

23 A. Correct.

24 Q. -- interested in that. They said -- they
25 said he had a gun, they thought, and all this other

1 Q. So at least with regard to this --

2 A. Well --

3 Q. Go ahead.

4 A. I believe that's accurate. At this point,
5 I'm not willing -- I don't recall whether it was Cook
6 or Fournier. I don't know that it matters.

7 Q. Okay.

8 A. So when you say W12, I would agree that one
9 of the Windham officers said something like that.

10 Q. Okay. And -- and it's not important to me
11 particularly, although it does give -- it does assign
12 W12.

13 But be that as it may, you don't take issue
14 that he was told that by one of the officers, do you?

15 A. No.

16 Q. So the only thing that was ever told to this
17 man that we know of, apart from drop the gun and the
18 things that have -- that are clear here, with regard
19 to what the police were there to maybe do was, one,
20 to -- to help him; and two, to call him, at least on
21 a positive basis.

22 Do you agree?

23 A. That's the only thing that was told to him
24 by the officers, correct.

25 Q. Okay. So neither of those occurred, did

<p style="text-align: center;">Page 161</p> <p>1 they? They didn't help him. They killed him, No. 1, 2 correct? 3 A. One of the officers shot him. 4 Q. And No. 2, they never called him on the 5 telephone. 6 A. They never made phone contact. 7 Q. And they had his number, didn't they? 8 A. I believe at some point they obtained a 9 phone number from Mrs. McKenney. 10 Q. They had his number, if you look closely at 11 the 911 call, because they obtained it from 12 Mrs. McKenney when she made the first complaint. She 13 gave them her landline number at her house. 14 Do you know that to be a fact? 15 MR. MARCHESSI: I object to your use of the 16 words "they" and "them" without any precision. 17 BY MR. LILLEY: 18 Q. Gave it to the dispatcher. 19 A. I don't know that to be the case. I -- I 20 suspect that that would be typical, so I don't doubt 21 that that happened, if you represent it so. 22 Q. I do represent it so. 23 And with regard to the getting it again, 24 which you're quite right, they -- they got it from -- 25 Mr. Fournier actually got it from her as they were</p>	<p style="text-align: center;">Page 162</p> <p>1 parked over by the cul-de-sac, correct? 2 A. Yes. 3 Q. She also asked if she could call him to 4 Officer Fournier. 5 Do you remember that? If she could call 6 Stephen. 7 A. I -- I remember that conversation. 8 Q. And she -- and he -- and -- and she was 9 denied that opportunity; he said no. 10 Do you remember that? 11 A. Correct. 12 Q. Was that good police practice under these 13 circumstances not to allow the wife, perhaps to call 14 and deescalate the situation a bit? 15 MR. BENJAMIN: Object to foundation. 16 THE WITNESS: That -- that is a -- a very 17 circumstance sensitive issue, but the general 18 teaching would be to not without some trained and 19 experienced crisis negotiator there to provide a 20 speaking script to the family member as well as the 21 ability for the crisis negotiator to listen so that 22 the crisis negotiator could help direct the 23 conversation, that's generally not a good idea. 24 BY MR. LILLEY: 25 Q. Well, short of the fact that they never</p>
<p style="text-align: center;">Page 163</p> <p>1 asked for a crisis negotiator, I don't believe, or at 2 least they never had one on the scene -- 3 MR. BENJAMIN: Object to foundation. 4 BY MR. LILLEY: 5 Q. -- wouldn't that -- wouldn't that be second 6 best, to get some communication going with this man 7 who they thought may have mental problems? 8 MR. BENJAMIN: Objection. 9 THE WITNESS: That -- that's generally 10 recommended not to happen. 11 BY MR. LILLEY: 12 Q. Not to happen. 13 A. Not to happen. 14 Q. The better -- the -- the better procedure is 15 what happened here in the last sentence of that 16 entry, "27 safety is going to get his long gun." 17 That's the better approach at this point? 18 A. You're -- you're shifting into an entirely 19 different realm. 20 Q. I'm -- I'm not. I'm just in the same 21 paragraph of the -- of the communications. 22 A. Yeah. I -- the -- the sergeant who sometime 23 after the fact created a synopsis of things that he 24 heard in a recording has indeed placed that in the 25 same paragraph. To that extent, you're accurate.</p>	<p style="text-align: center;">Page 164</p> <p>1 Q. And as a matter of fact, do you agree with 2 me that when they first went in, going back even to 3 the first confrontation, and I use the word 4 advisedly, they came into a building with a -- or the 5 home rather, this man's home, knowing that he had 6 lots of guns around, that he was -- perhaps had 7 emotional issues or mental issues, that perhaps this 8 was a domestic dispute matter, perhaps he was going 9 to commit suicide. 10 When they came in with their guns drawn, at 11 least two out of three of them we now know, isn't 12 that escalating the situation with a -- with a person 13 like this and his apparent background, rather than 14 deescalating it, guns drawn in this man's house? 15 MR. BENJAMIN: I'm going to object to 16 foundation. 17 Go ahead. 18 THE WITNESS: I don't know that I would -- 19 I -- I just don't know that I'd reach that value 20 judgment on whether that was escalating or 21 deescalating. It was sensible police procedure. 22 BY MR. LILLEY: 23 Q. It was? 24 A. Yes. 25 Q. Well, doesn't that increase the stress on --</p>

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1 on everybody, particularly the deceased here, to have
2 officers come into his house, if he's having mental
3 difficulty and it's possible suicide -- suicidal,
4 with guns drawn? Isn't that a stress factor, an
5 increase in stress factor rather than a deescalation
6 factor?

7 MR. MARCHESSI: Objection. Form.

8 MR. BENJAMIN: Object to foundation.

9 BY MR. LILLEY:

10 Q. Or maybe -- let me withdraw it.

11 Do you agree that the police officers when
12 they arrived on the scene of -- of similar kinds of
13 situations should try to deescalate the situation
14 rather than to escalate it as a general proposition?

15 A. As a general proposition, deescalation is
16 preferable to escalation.

17 Q. This certainly, you would admit, would you
18 not, sir, is not deescalating the situation, coming
19 in with guns drawn?

20 MR. BENJAMIN: Objection.

21 THE WITNESS: I -- I -- I'm not sure that I
22 would place that value judgment here.

23 BY MR. LILLEY:

24 Q. Well, if somebody came in your house and had
25 their guns out, that would increase your stress level

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1 rather than decrease it, wouldn't it, sir, just on --
2 just those facts alone?

3 A. In most circumstances, it would.

4 Q. Okay. Let's go back here to your report, if
5 we can, which I think I was on about page 5.

6 Just --

7 A. Okay.

8 Q. -- just so we understand, I don't -- it's a
9 matter of pride, I guess, and I hope you'll forgive
10 me, but I don't like to have suggestions that I'm not
11 stating the facts. So let's look, if we can, at
12 the -- page 6.

13 On the No. 3, did you write, "Deputy Mangino
14 realized there was no effective safe zone, though the
15 officers held a loose perimeter. McKenney had a
16 strong advantage of wide fields of fire, and he was
17 armed with a weapon capable of penetrating building
18 and walls and killing any of the neighbors or persons
19 walking or jogging in the surrounding woods and
20 pathways."

21 Are those your words?

22 A. I wrote that.

23 Q. Okay. So there's where I got my loose
24 perimeter.

25 Do you understand that?

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1 A. Uh-huh.

2 Q. Do you remember --

3 A. I do --

4 Q. -- making that --

5 And let me just ask you a little bit about
6 the rest of the statement.

7 When you say "Mangino had no effective safe
8 zone," that isn't bad as in being behind the --
9 the -- the block of a -- of a -- of an engine behind
10 a vehicle --

11 MR. BENJAMIN: Object to --

12 BY MR. LILLEY:

13 Q. -- in the hidden manner.

14 That's pretty good cover, isn't it?

15 MR. BENJAMIN: Object.

16 BY MR. LILLEY:

17 Q. I mean, may not be perfect, but pretty good.

18 A. Sure. I -- I -- I really -- I mean, I'm
19 happy to visit that again, but I -- I'm -- I'm really
20 not going to be able to tell you anything other than
21 what I told you this morning.

22 It's -- it's effective cover for several
23 linear or even square feet.

24 Q. Well, we're talking in this case
25 approximately 100 feet down to -- he shot him -- I

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1 believe the measurements are 69 feet from where
2 the -- where Mangino was.

3 That's a pretty -- pretty long distance, is
4 it not, under these circumstances?

5 A. Sure.

6 Q. And we've gone through it before, and I
7 don't want to go over -- plow old ground if we
8 can ...

9 But your statement, McKenney had a strong --
10 a strong advantage of wide -- of wide fields of fire,
11 what do you mean by that?

12 A. He had the ability to pivot and fire into
13 any number of -- of directions.

14 Q. There was nobody -- there's no evidence
15 whatsoever that at that time of the morning and in --
16 for the fact that the perimeter is whatever it is,
17 loose or otherwise, and the other police that are
18 there blocking off roads, there's no indication
19 whatsoever that anybody was walking in that area; is
20 there? No evidence of it?

21 A. I've not seen any evidence that -- that
22 persons were identified that were walking in the
23 area.

24 Q. Did you ever -- did you ever read anything
25 in which we -- we've asked other witnesses whether

<p>Page 169</p> <p>1 anybody in the area and they said no? Did you hear 2 that -- did you read that in any depositions? I 3 can't recall the source, but one of them, I know, 4 said it. 5 A. I believe that some of them may have said 6 they didn't see anybody in the area, and I certainly 7 agree with that. 8 Q. There was no bicycling -- what do you -- you 9 go on with neighbors walking or jogging and in 10 surrounding woods and pathways. 11 This is all pure speculation, isn't it? 12 A. No. 13 Q. It's not supported by any evidence, is it? 14 A. I don't believe that any of the officers saw 15 anyone. 16 Q. Well, do you have any evidence that there 17 was anybody there? 18 A. I don't have anything to suggest that any of 19 the officers saw it. 20 Q. So you don't have any evidence that there 21 was one soul in that area, do you, sir, other than 22 the folks that have been identified? 23 A. I have as much evidence that the -- the 24 hundreds of people that live within the dozen homes 25 in the immediate area were not all evacuated and out</p>	<p>Page 170</p> <p>1 of the area. By the same token, I don't think any of 2 the officers saw them. 3 Q. You have absolutely no evidence, do you, 4 sir, that there was anybody in the neighborhood 5 walking or jogging or in the area of the surrounding 6 woods and pathways? It's simply absence of evidence, 7 and you're assuming the assumptions; isn't that 8 correct? 9 A. I -- I will not disagree with your 10 characterization, although I -- I disagree with your 11 logic. 12 Q. Well, what's wrong with my logic? 13 A. Having -- having examined the area with -- 14 within a -- a quarter mile, there are many, many 15 homes, cars and driveways, well-tended lawns, all of 16 which suggest that this is a substantially populated 17 area. It is certainly reasonable to believe that not 18 all of the likely hundreds, if not certainly dozens, 19 of people who live in those many homes surrounding 20 had not all gone somewhere else far out of the range 21 of Mr. McKenney's weapon. 22 It is accurate, however, that none of the 23 officers saw anyone, they didn't see -- look through 24 windows or see that people had arisen to the sound 25 and the aroma of an automatic coffee pot or that they</p>
<p>Page 171</p> <p>1 were exercising on a treadmill in one of the rooms in 2 their home or getting up to change the diaper on a 3 baby that had just woken up or feeding a -- a child 4 in a highchair. We don't know any of that. 5 Q. Okay. 6 A. However, your logic suggests that because no 7 one saw them, that they don't exist and -- 8 Q. No. 9 A. -- they weren't there. 10 Q. You're not listening to my -- 11 A. That I can't agree with. 12 Q. -- my question. My question talks about the 13 specifics, about people jogging, walking around in 14 the woods and in the pathways. 15 There's no evidence of that, is there? I'm 16 not talking about people in their houses. We'll get 17 to that, though. But I -- I'm talking about what you 18 said here. There's no evidence of that. 19 That's pure speculation, isn't it? 20 A. There are a number of pathways through the 21 woods as well as jogging paths in the area. None of 22 the officers saw anyone on those well-used paths. 23 Q. Nobody saw anyone on those used paths, 24 right? 25 A. I haven't been told that anybody saw anyone</p>	<p>Page 172</p> <p>1 on those paths. 2 Q. So you can't make assumptions, can you, sir, 3 without evidence? Don't we live in an evidence-based 4 world, you and I as lawyers and you as a lawyer and a 5 police officer? Evidence based. 6 A. Mm-hmm. Correct. 7 Q. And with regard to the -- the home area, 8 were you aware that is a -- generally a retirement 9 community? 10 MR. BENJAMIN: Object to foundation. 11 BY MR. LILLEY: 12 Q. Just a simple question. Yes or no? 13 A. No. 14 Q. And that the house next to the condo that 15 was -- that was owned by someone next to the 16 McKenneys was vacant because those folks were in 17 Florida. 18 You didn't -- did you ever find that out? 19 A. I don't know that to be the case. 20 Q. Okay. So you -- right now, I'm going to 21 represent to you that it is the case. 22 You going to accept that? I've been doing 23 pretty good now. 24 MR. MARCHESSI: Objection. 25 THE WITNESS: I -- I don't know. I recall</p>

1 there had been some recent conversation with those
2 folks, so I -- whether it happened door to door or
3 over the telephone, I don't know.

4 BY MR. LILLEY:

5 Q. Well, those are the folks that he had --
6 McKenney had originally moved the -- the
7 air-conditioning for, wasn't it? That caused his
8 back problem. Do you know that to be the case?

9 A. I don't know that that caused his back
10 problem.

11 Q. Okay.

12 A. And I don't know that it matters. But I
13 know he moved an air conditioner. I know that he was
14 in contact with the neighbors.

15 Q. I'll suggest to you that that was the
16 neighbor, and the neighbors were in Florida. And the
17 neighbor across the street was in Florida. The one
18 next -- adjacent on a clockwise position.

19 Did you know that?

20 A. I did not.

21 Q. Okay. Let's move on.

22 So I take it, sir, that your -- your point
23 is well taken, I would submit, that other people can
24 be shot if guns are shot where there are people.

25 Fair statement?

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2 folks, so I -- whether it happened door to door or
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4 BY MR. LILLEY:

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18 next -- adjacent on a clockwise position.

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21 Q. Okay. Let's move on.

22 So I take it, sir, that your -- your point
23 is well taken, I would submit, that other people can
24 be shot if guns are shot where there are people.

25 Fair statement?

1 A. Yes.

2 Q. But that could happen in any setting, in a
3 hunting setting, bird hunting, deer hunting. I don't
4 know what you hunt for around here, but that's always
5 a risk, that stray bullets can hit people and do from
6 time to time; is that correct?

7 A. Certainly the risk varies with the
8 circumstances --

9 Q. Right.

10 A. -- but it happens from time to time and
11 typically, this time of year, it's elk and -- and
12 deer.

13 Q. Okay. But we don't ban the hunting of those
14 animals because the fact that a bullet might stray
15 and hit and even kill somebody, do we?

16 A. No. We impose a -- a number of reasonable
17 and --

18 Q. Right.

19 A. -- fairly restrictive safety restrictions
20 that follow.

21 Q. You indicate that -- on page 7 -- I'm moving
22 on fortunately.

23 On page 7, in the middle of the second --
24 first paragraph, you -- you admit -- you say -- let's
25 just read it. It will be faster, I guess.

1 You say about three lines down, "A
2 reasonable well-trained officer would consider these
3 facts and would recognize that a rifle is better
4 suited to address the threat presented."

5 That -- that essentially summarizes some of
6 our earlier -- your earlier answers, correct?

7 A. Yes, sir.

8 Q. And -- and you also say that in addition --
9 the last sentence there, or middle sentence there,
10 "In addition to his law enforcement training, Mangino
11 had extensive training with the patrol rifle through
12 his military service," correct?

13 A. Yes, sir.

14 Q. So he not only was trained as a police
15 officer at the academy, he was trained as a -- I
16 believe he was an Air Force reservist, correct?

17 A. Yes.

18 Q. Or at least in the service.

19 A. I think it was reserve, yes, sir, or
20 National Guard.

21 Q. And there's no reason to believe, is there,
22 that -- I mean, you don't know -- but there's no
23 reason to believe that Mr. McKenney had any kind of
24 training of intensity and of using firearms as
25 Mr. Mangino, at least using logic.

1 MR. BENJAMIN: Objection. Foundation.

2 THE WITNESS: I don't know.

3 BY MR. LILLEY:

4 Q. Right. You just don't have any -- any
5 information.

6 A. I do not.

7 Q. So apart from the age differences, there's
8 no -- you -- we never got any -- any particular --
9 outside of the fact that Mr. McKenney had rifles and
10 guns in his house, there is no indication that he had
11 any training on any of those, is there?

12 A. Not of which I am aware.

13 Q. Okay. All right. Now, on page 8, if we
14 could flip over there 8, there's a statement I -- I'd
15 like to ask you a few things about.

16 On the top of the page, you say, "Moreover,
17 he was specially trained in crisis intervention
18 techniques and communicating with persons."

19 What are you -- and you're talking about
20 McKenney, I believe, if you want to read before or
21 after.

22 What -- what do you base --

23 MR. LILLEY: What?

24 MR. BENJAMIN: Mangino.

25 ///

1 BY MR. LILLEY:

2 Q. Mangino. What do you base that on?

3 A. He had attended the crisis intervention
4 technique course.

5 Q. Okay. And did he have any experience or
6 training in a situation similar to this, ever in
7 your -- in -- in anything that you looked at?

8 A. That would depend on the curriculum that was
9 offered in the CIT course and whether that was
10 consistent with the national curriculum that is used.

11 Q. Do you have any evidence that he had any
12 training in the area in which he was -- which he
13 killed a man using lethal force?

14 MR. MARCHESSI: Objection to form.

15 BY MR. LILLEY:

16 Q. Any -- any evidence whatsoever outside of
17 what we've talked about here in -- in terms of
18 Cumberland County SOPs and things of that nature.

19 A. Out -- outside of the training and the
20 instruction of policies that we've discussed here
21 today and that are in the record, no, I do not.

22 Q. But you don't know that he even read those
23 policies. We've already been through that, correct?
24 The policies we went through when we were doing the
25 inventory, we don't even know that he's ever even

1 read those.

2 Do you agree? You never determined it.

3 A. I don't know. I don't know that someone
4 doesn't know, but I don't know.

5 Q. Okay. Now, you cite in your -- in -- let's
6 move up to page 10 and skip a couple pages.

7 You cite in your report -- excuse me.

8 A. Do you want one of these, sir?

9 Q. Maybe I better. Thank you.

10 (Discussion held off the record.)

11 BY MR. LILLEY:

12 Q. You -- you -- on page 10 of your report, you
13 specifically talk about Mangino being instructed in
14 one of the Lieutenant Tueller's common maxim action
15 beats reaction.

16 Do you see that?

17 A. Yes.

18 Q. Top of the page there.

19 And it -- then you go on to say, "In my work
20 as a certified force" signist -- "force science
21 analyst."

22 You see where you're saying that?

23 A. Yes.

24 Q. That's what I was asking you about before,
25 were you certified, and you said you didn't know

1 whether you were or not. You -- you say you are in
2 your report, right?

3 A. No.

4 Q. No. Am I misreading it?

5 A. You are confounding facts.

6 Q. Okay. You tell me what --

7 A. Lieutenant --

8 Q. Explain it.

9 A. Yeah, so the force science program from
10 Mankato State University is the Force Science
11 Institute is operated by Bill Lewinski, Dr. Bill
12 Lewinski. It's -- it's separate and apart from
13 Lieutenant Tueller's --

14 Q. Oh, okay.

15 A. -- now retired, but former Lieutenant
16 Tueller's work.

17 So I -- I didn't know that you were going
18 this direction. I am certified through the Force
19 Science Institute as an analyst and -- and --

20 Q. Oh, okay.

21 A. But Lieutenant Tueller's courses are
22 separate. I can see how -- because they're in the
23 same paragraph that may have misled you.

24 Q. It may have, and I appreciate your
25 clarification.

1 So Tueller didn't certify you on anything,
2 but you were certified by Lewinski in the Force
3 Science group --

4 A. Correct.

5 Q. -- that he --

6 A. Yes, sir.

7 Q. -- has -- has done.

8 And what were you -- sorry.

9 A. I have a lot more of these --

10 Q. No, no, that's all right. One's enough.

11 MR. MARCHESSI: He's just going to give you
12 enough until you choke on one.

13 MR. LILLEY: Yeah. I know. You got
14 something in this, haven't you? Because I put sodium
15 pentothal in your water. I just want you to know
16 that.

17 MR. MARCHESSI: One way or the other, we're
18 getting out of here soon. One of you guys is going
19 to --

20 THE WITNESS: Well, the grand irony of that,
21 of course, is that -- that -- try to sell incredibly
22 restricted for purposes of lethal injection, but --
23 but I digress.

24 MR. LILLEY: Yes. Okay.

25 THE WITNESS: Anyway --

1 MR. LILLEY: Let's hold on. Trying to get
2 through this. I appreciate it. And I'm guilty of it
3 too.

4 BY MR. LILLEY:

5 Q. So in any way, Dr. Lewinski -- who's
6 Dr. Lewinski?

7 A. Dr. --

8 Q. Not related to Monica, I assume.

9 A. No.

10 MR. MARCHESI: Put that on the record.

11 THE WITNESS: No. I'm -- I'm confident the
12 poor man is asked that a number of occasions.

13 Dr. Lewinski is a -- I -- I don't remember
14 what his exact degree is. He's -- he's a biomechanic
15 specialist professor at Mankato State University
16 and -- and operates a program at the university
17 called the Force Science Institute.

18 It's -- I'm sure you're familiar with it
19 because Mr. Tucker has referred to -- to their work,
20 but it's a -- it's an institute, and Dr. Lewinski
21 being an instructor that studies the application of
22 human performance factors to actions taken by law
23 enforcement officers and people they deal with.

24 BY MR. LILLEY:

25 Q. He's a psychologist, isn't he?

1 A. I think that his degree is in psychology.

2 Q. And he's the guy that embraces, among
3 others, and I think you, the concept of action beats
4 reaction in law enforcement.

5 Am I right?

6 A. I -- I think he would express it slightly
7 differently, but I -- you'd have to ask him if he
8 would accept that statement, but I -- I suspect
9 that's accurate.

10 Q. In this case, action beats reaction does not
11 apply, does it?

12 A. I disagree.

13 Q. Given the -- well, let -- let me try to
14 tighten that question up a little.

15 Given the fact of the distances, the cover,
16 the -- the -- the -- the training of the police
17 officer, this isn't your typical test, at least as
18 far as I -- I've read it, of the -- the Force Science
19 Institute in trying to prove that action beats
20 reaction.

21 Do you agree with that? And I'll get a
22 little sharper on the question, if you want.

23 A. I mean, this scenario is not altogether that
24 far afield from testing that I haven't participated
25 in nor have I read the actual study results, but I --

1 I've been exposed to testing that's been done at the
2 Force Science Institute that -- that's not altogether
3 dissimilar from the fact pattern that un -- unravels
4 here.

5 Q. Come now, sir. You know that the -- the
6 tests that are -- that -- that Lewinski and Tueller
7 before him have done generally consists of shooting
8 or assault within a 20, 21-foot confinement, No. 1,
9 correct?

10 A. Some do.

11 Q. All do, don't they, on the testing side?

12 A. I don't believe so.

13 Q. Are you familiar with any test whatsoever in
14 which Mr. Tueller or Mr. Lewinski ever tried the
15 action beats reaction test when the distance between
16 the shooter and the -- and the -- and the -- the
17 subject was greater than 50 feet?

18 A. I'm -- I'm not certain. I've seen some
19 testing done by Force Science at a longer distance.
20 I -- I don't know -- and, you know, frankly some of
21 the testing they've done at distances are irrelevant
22 to the analysis.

23 Q. Well, have you ever seen one, adding to
24 that, the test done in which one of the participants,
25 namely the police officer, was -- was behind cover

1 which -- which either -- either Tueller or Lewinski
2 did?

3 One of the participants, the police officer,
4 is -- as -- is behind cover similar to what we have
5 here.

6 A. I believe a few years ago, I did see a -- a
7 video that demonstrated the scripting of part of the
8 study done by Force Science that involved the officer
9 being behind cover.

10 Q. Do you remember the result?

11 A. I don't.

12 Q. And that result, reaction being action, did
13 it not?

14 A. No.

15 Q. You sure?

16 A. Yes.

17 Q. And with regard to Tueller, his claim to
18 fame is he wrote an article in 1983, as I recall,
19 that said "How Close is Too Close?," correct?

20 A. No.

21 Q. Okay. What's his claim to fame?

22 MR. MARCHESI: Again, just -- you asked two
23 questions and the witness said no.

24 You asked what his claim to fame was and
25 then whether he wrote a study, so I'm not sure which

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<p>1 the no was to. Perhaps we could get some 2 clarification on that. 3 BY MR. LILLEY: 4 Q. Sure. Clarify that for your -- 5 A. Lieutenant Tueller wrote the article 6 published in S.W.A.T. Magazine, and the title is, I 7 believe "How Close is Too Close?" I believe it was 8 published in the spring of 1984. I don't recall 9 exactly the month. 10 I don't think that Lieutenant Tueller, were 11 he here today, would say that that is his claim to 12 fame. 13 Q. Okay. He might not say it, but that is in 14 fact what people have been -- the mantra that a lot 15 of police officers, including yourself, taught other 16 police officers; is that not true? Just simply 17 action beats reaction. 18 A. I've taught officers principles related to 19 that. I've used that expression. 20 Q. And you -- 21 A. I -- 22 Q. Go ahead. 23 A. I know Lieutenant Tueller and that -- I 24 certainly wouldn't say that's his claim to fame. 25 Q. Okay. His article, "How Close is Too</p>	<p>1 Close?" isn't the most famous article in -- in recent 2 history in the police annals? 3 MR. MARCHESI: I object. Form and 4 foundation. 5 THE WITNESS: I -- I don't know. 6 BY MR. LILLEY: 7 Q. Well, okay. I mean, we don't have to -- I 8 don't want to beat that to death, but I would like 9 to -- you do agree that it's been an article that has 10 been -- had impact on various police department and 11 police training. 12 Do you agree that? 13 A. Yes. 14 Q. And, in fact, that's where the concept, the 15 phrase, the mantra action beats reaction was born. 16 Do you agree with that? 17 A. No. 18 Q. Where did that phrase come from, action 19 beats reaction, if you know? 20 A. I don't know. 21 Q. And at least so that we can get this out of 22 the way, with regard to Mr. Tueller, that experiment 23 was an experiment done with one person holding a 24 rubber knife, the other person having a gun with 25 blanks, and they were 21 feet apart.</p>
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<p>1 Do you agree? 2 A. Most of them were done in that fashion. The 3 test was repeated on a number of occasions with many 4 different participants. 5 Q. I'm talking about the original test in the 6 article action beats -- the original article "How 7 Close is Too Close?" 8 Isn't that the genesis of the whole concept 9 of action beats reaction? 10 A. I'm not -- not sure of the question. 11 I -- I don't think that's where the phrase 12 came from, and the article was published not based on 13 one person, and with a -- a gun loaded with blanks 14 and one person with a rubber knife. 15 Q. What was it based on? 16 A. As I just said, it was based on a number of 17 repetitions of a very similar scenario, as you've 18 described. 19 Q. At -- at a 20- to 21-foot distance, correct? 20 A. At a 21-foot distance. 21 Q. This distance here when my client was shot 22 was 69 feet according to the attorney general's tape. 23 Do you agree with that? 24 A. Yes. 25 Q. That makes it three times, does it not,</p>	<p>1 longer distance between the shooter and the -- and 2 the -- and the deceased than that article? 3 A. Correct. 4 Q. And also, Tueller's article, the shooter was 5 not behind cover. 6 Do you agree with that? 7 A. Correct. 8 Q. And also in that article, the shooter did 9 not have a fire -- a -- a long gun. 10 Do you agree that? 11 A. Yes. 12 Q. And in the Tueller article, the deceased, 13 the faux deceased, the pretend deceased, was a well 14 trained officer with a -- with a firearm and with a 15 knife, that is -- am I making myself clear? Do you 16 understand -- 17 A. The participants in the original assessing? 18 Q. Yes. 19 A. Yes. 20 Q. So what are the similarities that you see 21 between Tueller's original concept about how close is 22 too close, we'll leave it at that, and the facts of 23 this case? What's similar about it? 24 A. Lieutenant Tueller's original series of 25 experiments and his article really address a</p>

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<p>1 different concept than -- than is involved in this 2 particular case. 3 Q. Okay. If that's the genesis for the concept 4 of action beats reaction, which you say in your 5 report here, do you not? 6 A. I do not? 7 Q. You do not? 8 A. I do not. And I just said a minute ago in 9 testimony I did not. 10 Q. Okay. 11 A. I don't believe -- 12 Q. I probably talk too much. I should listen 13 more. 14 Go ahead. I'm sorry. 15 A. I don't believe that Lieutenant Tueller -- 16 that Sergeant Tueller originated that maximum. I had 17 heard it before and I believe he had heard it before. 18 Q. Well, did Lewinski do it? 19 A. I don't -- I don't know what the source of 20 that particular couplet is. I don't -- I don't know. 21 Q. Well, you've been certified by Lewinski. 22 Let me -- correct? 23 A. Yes. 24 Q. Let me ask you: How does he conduct his 25 tests with -- in order to determine the length of</p>	<p>1 time it takes for a person to shoot another person -- 2 A. Hmm. 3 Q. -- or the other person to shoot the police 4 officer, whatever issues that he's dealing with in 5 that -- in that -- in that inquiry? 6 A. I -- I can only speak in generalities, and I 7 don't believe that I can speak with absolute 8 certainty of how he -- how he conducts the tests. So 9 I -- I know that a couple of them that I've studied a 10 little more carefully, the first step for him is 11 to -- is to articulate and refine a hypothesis. 12 He'll circulate that hypothesis to some of his 13 colleagues in the field, and then he will design a -- 14 a -- a testing plan, essentially a business plan for 15 how he's going to execute the test. He'll take that 16 to his peers as well as to an institutional review 17 committee. The institutional review committee -- 18 Q. Sir, sir, I'm -- you can keep going, but I'm 19 just after the test itself. 20 Have you seen one? 21 A. Yes. 22 Q. And what -- tell -- describe what they do. 23 A. Well, I -- okay. 24 Q. Just a typical one. I -- I -- I've read 25 some of his stuff.</p>

1 you on that point, I -- I'm not aware of any.
2 Q. And they're -- usually have similar weapons,
3 do they not? Firearms, handguns, or rifles.
4 Sometimes they mix them up, but they usually have
5 handguns, that is the suspect and the police officer,
6 or do you know?
7 A. I don't -- I -- I don't know.
8 Q. And they use a -- what they call a -- I
9 think it's called a shot clock, do they not? I
10 think -- I may have the wrong name, but it's where
11 you --
12 A. Well --
13 Q. -- push the buzzer and then people start
14 moving.
15 A. Shot clock is one that speaks to a number of
16 instruments, but -- but there are shot clocks that
17 give an audible signal and -- and I've seen those
18 used.
19 Q. Okay. But normally, though, it's -- it's --
20 yes. And -- and most of Lewinski's are done with a
21 shot clock, are they not? That you've read about but
22 you haven't seen.
23 A. I don't know about most. A number are. I
24 don't know about most.
25 Q. And the -- and the -- and the idea is that

1 when the buzzer goes off, the person who has --
2 the gun by their side, let's say, using that example,
3 I think -- I think he calls it bootleg, actually.
4 Do you recall him calling it that?
5 A. One of the positions that he tests from a
6 seated position in a chair in the studio is -- he
7 refers to as bootleg.
8 Q. No, I'm talking about standing up with a gun
9 by your -- by your calf.
10 A. You can do -- yeah. Okay. You can do
11 bootleg either way.
12 Q. Okay.
13 A. But yes.
14 Q. And -- and -- and that would be the
15 so-called -- the -- the -- the -- the hypothetical
16 suspect in -- in a case or -- or subject.
17 And the other officer would have his firearm
18 pointed right at the suspect, loaded gun, although it
19 would be obviously blanks, with his hand on the
20 trigger.
21 That would be the typical setup, would it
22 not, to determine whether action beats reaction under
23 those circumstances?
24 MR. MARCHESSI: Objection to form.
25 THE WITNESS: I -- I don't know whether

1 Dr. Lewinski would say that's typical and whether
2 that in fact is typical given the -- the variety of
3 tests that he's done.
4 It -- it certainly represents one vein of
5 testing that -- that I've not participated in but
6 have seen videos of.
7 BY MR. LILLEY:
8 Q. But -- but in -- in any event, do you at
9 least agree that the methodology is the same, that he
10 uses a -- a buzzer, usually, to go off, and then
11 the -- the suspect makes an effort to point the gun
12 and the barrel at the police officer?
13 A. I -- I have seen a test like that executed.
14 Q. And then the police officer responds by
15 pulling a trigger that activates the shot clock as to
16 when his shot is fired so you can determine who gets
17 there first, correct?
18 A. Yes.
19 Q. Now, does that principle work in every case?
20 Action meets reaction.
21 A. I'm -- I'm not really sure what you meant by
22 every principle or every case, so I -- I --
23 Q. Well, is it a principle that you teach
24 your -- your folks? You -- you teach the law
25 enforcement people that action beats reaction, do you

1 not?
2 A. I -- I teach them that as a scientific fact
3 that stimulus always precedes response.
4 Q. Oh, come on, sir. Now, you -- you -- you
5 don't teach them in those words, do you? Don't
6 you --
7 A. No.
8 Q. -- teach them in terms of their guns, that
9 action beats reaction, if you have a person trying to
10 raise their gun while the other person has the gun
11 trained on them?
12 A. By definition, I believe that's true.
13 Q. The article that we furnished, and I assume
14 you've had an opportunity to look at it, that was
15 done by my expert in this case, Mel Tucker, have you
16 had an opportunity to look at that?
17 A. No.
18 Q. You haven't. Well, maybe at the -- it's
19 only three pages. Maybe at the break you can do it.
20 Do you have a copy of it?
21 A. I do not.
22 Q. Well, you -- you do now because I'll furnish
23 you one. But let's not delay, so I'll -- I'll let
24 you -- you want to look at it later.
25 Let me ask you with regard to Mr. Tucker,

1 however, that he -- I'll -- I'll represent to you
2 that his article, "Action always beats reaction or
3 does it?" essentially are the findings that he made
4 by doing his experiment that I think you have looked
5 at, correct?

6 A. I've looked at the video he made.

7 Q. Pardon me?

8 A. I've looked at a video that he made.

9 Q. Okay. Do you think it's valid, the findings
10 that he came up with?

11 A. I think that the execution of his case study
12 leaves much to be desired.

13 Q. And what did -- what specifically do you
14 think needs to be added?

15 A. I didn't say anything needed to be added.

16 Q. Well, didn't he do essentially the same
17 thing that Lewinski has done in the past to come to
18 certain conclusions?

19 A. Oh, my. No. No, no, no, no, no. Not even
20 close.

21 Q. Well, you've got to tell me what the
22 difference is, then, because -- well, let -- let's go
23 through it.

24 At least with regard to Tucker, he got
25 together with another police chief and they -- for

1 this case, apparently, using this case as a impetus
2 for their experiment, they had a -- a clock that did
3 what I said it did, did -- did they not? When the --
4 when Tucker tried to raise his gun and the other
5 officer, Roy Taylor, had his gun pointed at Tucker,
6 the clock would go off each time each one of them
7 pulled the trigger.

8 You understand that to be the case so far?

9 MR. MARCHESI: Objection. Form.
10 Foundation.

11 THE WITNESS: No.

12 BY MR. LILLEY:

13 Q. You don't understand that to be the case?
14 Well, then tell me what you -- you understand the
15 experiment to be.

16 A. Well, in -- in his deposition --

17 Q. Tell me about the experiment itself. I'm
18 not talking about his deposition. I'm talking about
19 the experiment that you saw on videotape.

20 MR. MARCHESI: Mr. Lilley, you asked the
21 question. He can answer it however he wants. And if
22 he wants to refer to something, he can do that.

23 Please answer.

24 THE WITNESS: In his deposition, Mr. Tucker
25 stated --

1 BY MR. LILLEY:

2 Q. You can keep going there, sir. It's going
3 to be longer than a deposition if you don't answer my
4 question. I'm not interested in his --

5 MR. MARCHESI: Mr. Lilley, you're not going
6 to --

7 THE WITNESS: I can't answer your question.

8 MR. MARCHESI: -- make threats --

9 BY MR. LILLEY:

10 Q. You can't answer my question?

11 A. I can't.

12 Q. Why?

13 A. You won't let me.

14 Q. I want you to talk about the experiment as
15 you saw it, not about what he said about it in his
16 deposition.

17 Can you do that, or if you can't --

18 A. I -- I can. I'll -- I'll have to not refer
19 to any external sources.

20 MR. MARCHESI: No, no --

21 MR. LILLEY: That would be good.

22 MR. MARCHESI: -- actually -- no. No. I --

23 MR. LILLEY: No, no. There's no objection
24 permitted here.

25 MR. MARCHESI: There is.

1 MR. LILLEY: I'm asking this expert, and he
2 is an expert, to take the deposition -- not the
3 deposition but the videotape of the experiment my
4 expert did and comment on it. It's perfectly
5 appropriate.

6 MR. MARCHESI: Mr. Lilley --

7 BY MR. LILLEY:

8 Q. So if you can do that, sir -- we'll talk
9 about his deposition later, but I want you to tell me
10 with regard to his actual experiment that you saw on
11 the -- on the disc -- and you did see it, correct?
12 Correct?

13 A. My answer on that is just not going to
14 change from the five or six or seven times you've
15 asked me. Yes, I saw it --

16 Q. Okay.

17 A. -- once with music and once without.

18 Q. Okay. Well, then -- then what's your
19 criticism of it?

20 MR. MARCHESI: Okay. And now, Mr. Lilley,
21 I'm going to say something. You asked him to
22 comment. He --

23 MR. LILLEY: On the experiment.

24 MR. MARCHESI: Excuse me. When you -- you
25 can frame a question any way you want, and the

<p>Page 201</p> <p>1 witness can give an answer any way the witness wants. 2 MR. LILLEY: No, he can't. 3 MR. MARCHESSI: Actually, you're wrong about 4 that. Okay? So you asked him a question -- 5 MR. LILLEY: I've asked him to give an 6 answer that talks about that, and he says he can 7 without -- but he would prefer to use external 8 information. 9 MR. MARCHESSI: Okay. Okay. Let me know 10 when you're done, and then I'm going to speak until 11 I'm done. 12 MR. LILLEY: This is an interlude at 3. Are 13 we about finished? 14 VIDEOGRAPHER: Twenty-four minutes left. 15 MR. MARCHESSI: Good ring tone. 16 MR. LILLEY: Pardon me? 17 VIDEOGRAPHER: We have 24 minutes left. 18 MR. LILLEY: Okay. He -- I want him to 19 answer just from the experiment, not from what 20 Mr. Tucker may have said about the experiment in the 21 deposition. Just from the experiment. 22 MR. MARCHESSI: You don't get to limit his 23 answer. 24 MR. LILLEY: I do get to limit his answer. 25 MR. MARCHESSI: I disagree, and I'm telling</p>	<p>Page 202</p> <p>1 this witness that he can answer the question any 2 way -- 3 MR. LILLEY: Are you instructing him not to 4 answer? 5 MR. MARCHESSI: I'm instructing him that he 6 is entitled to answer the question -- 7 MR. LILLEY: Well, you're instructing -- 8 MR. MARCHESSI: -- using any information -- 9 MR. LILLEY: You're obstructing this 10 deposition, as you do at around about this time of 11 every deposition I've had. 12 MR. MARCHESSI: No. 13 BY MR. LILLEY: 14 Q. Let me ask you, sir: Can you comment on 15 the -- on the actual experiment itself? Do you feel 16 capable of doing that without reference to 17 Mr. Tucker's deposition or any outside source? 18 A. Sure. I can give a -- 19 Q. Okay. 20 A. I can give an incomplete answer. 21 Q. Okay. And that's fine. And we'll complete 22 it as much as we can. And then these folks will have 23 an opportunity to ask you questions when I'm 24 finished. 25 Tell me what your position is with regard to</p>
<p>Page 203</p> <p>1 that experiment. And when I say "position," and I 2 want to make that -- what is your critique about that 3 experiment that you don't think it matches the 4 experimentation in any way of Mr. Lewinski? 5 A. If it were to match the experimentation done 6 by Dr. Lewinski, the -- a number of the factors that 7 I discussed earlier with respect to creation of a 8 hypothesis, peer discussion and peer review of the 9 hypothesis for validity as a principled hypothesis 10 that can be explored through the scientific method, 11 followed by then a return to the drawing table to 12 design and articulate in a way that others can read 13 and critique and experiment that then is capable of 14 execution and capable of repetition by other 15 similarly situated practitioners in that field, then 16 the experiment would be taken to an institutional 17 review committee that would review the proposed 18 experiment for a number of -- a number of different 19 issues, safety, the legality, copyright issues -- 20 Q. Oh, come now, sir. I'm going to -- 21 MR. MARCHESSI: Please let him finish. 22 BY MR. LILLEY: 23 Q. I'm asking you about -- 24 MR. MARCHESSI: No. No. 25 ///</p>	<p>Page 204</p> <p>1 BY MR. LILLEY: 2 Q. -- the actual test itself. 3 MR. MARCHESSI: Mr. Lilley -- 4 BY MR. LILLEY: 5 Q. I understand what you're saying. 6 MR. MARCHESSI: Mr. Lilley -- 7 BY MR. LILLEY: 8 Q. Do you think you're finished? 9 A. I'm not even close to being finished. 10 Q. Go ahead. 11 A. The institutional review committee would 12 study a number of issues be it copyright, and perhaps 13 most significant, they would look at the validity of 14 the design for the experiment itself. The experiment 15 that would then be conducted using control groups -- 16 and this would all be defined well in advance, and 17 a -- a minimum cohort would be studied. 18 Q. A what? 19 A. Minimum cohort. 20 Q. Okay. 21 A. A minimum cohort. 22 Q. What's that mean? 23 A. Well, I don't -- a minimum cohort is a -- 24 in -- in science and in medical research, there are 25 studies. There are case series. There are different</p>

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<p>1 levels of scientific exploration. 2 And for a study to have any validity, there 3 need to be a number of participants tested in 4 precisely the identical fashion. And the cohorts' 5 limitations and abilities need to be discussed in the 6 paper. 7 So Dr. Lewinski would bring -- and -- and 8 I'm talking about something that anybody -- any 9 respectable scientist wanting to conduct an 10 experiment would follow these -- follow these steps. 11 I'm not a scientist. I don't do this work, but I've 12 read enough of them and talked to enough of them to 13 know that -- that they would say "psha" to anybody 14 who didn't do these core critical steps. 15 So then once the cohort is assembled under 16 very controlled conditions, testing for making sure 17 that there is -- they have minimized or eliminated as 18 many variables as possible, they would conduct their 19 testing. They would then do an analysis of their 20 test. They would circulate that analysis among peers 21 for peer review, and then ultimately, the paper would 22 be approved for publication. 23 I didn't see any of that process followed in 24 the -- in the information that I obtained solely from 25 the -- the video -- the video that was staged by</p>	<p>1 Mr. Taylor and -- and Mr. Tucker. 2 Q. So -- so -- 3 A. The -- the actual execution seemed puzzling 4 to me in that it -- it appeared to me that Mr. Tucker 5 was actually emotionally overwrought or was acting as 6 if he were emotionally overwrought when he hears the 7 stimulus of gunfire or at least when he -- in that 8 general area. 9 He controls, in that situation, something 10 that in a valid experiment someone else would be 11 controlling, and that's the activation of the actual 12 stimulus. Although, I'm not sure he understands -- 13 in fact, I'm sure he's confused about this. But 14 he -- he's the one that's really starting the 15 sequence of events because he's the one who's 16 activating the device that makes the sound that then 17 triggers some kind of response from somebody. 18 Q. Who -- who's activating the stimulus? 19 Mr. Tucker? 20 A. It appears to me that Mr. Tucker is. 21 Q. Where do you get that information? There's 22 nothing on the -- on the videotape that would show 23 that, is there? 24 A. Oh, yes. 25 Q. Well, what is it?</p>
<p style="text-align: center;">Page 207</p> <p>1 A. You can see the contracture of his muscles 2 as he activates the shot clock, which it appears 3 that -- I don't know. I don't want to impute any 4 motives to him, but it sort of appears he's trying to 5 hide it. 6 Q. Hide -- 7 A. That he's trying to hide it. 8 Q. Hide what? 9 A. The shot clock. 10 Q. He's trying to hide it. 11 A. No. I said I don't want to cast aspersions, 12 but it appears that he's trying to hide it. 13 Q. Because you say his muscles do what? 14 A. The contracture of his muscles. You can see 15 arm movement. 16 Q. Do what -- do what and what do they mean? 17 A. It appears to me that he's triggering the 18 sound, that he's the one holding the shot clock. 19 Q. Okay. And therefore, that the -- well, you 20 are, and you're saying that it appears to you that 21 he's doing this dishonestly, correct? 22 A. I didn't say that. 23 Q. But that's what you're saying, isn't it, in 24 substance? 25 A. No.</p>	<p style="text-align: center;">Page 208</p> <p>1 Q. You're -- you're saying that he's trying to 2 skew the results by -- by controlling and causing the 3 stimulus whenever he pleases. 4 Isn't that what you're saying? 5 A. I believe that he controls the stimulus 6 whenever he pleases. 7 Q. And if he doesn't control the stimulus, if 8 someone else is -- is -- is -- is causing the -- the 9 beep to go off, would that allay your concerns? 10 A. That would begin -- that would be one of 11 many, many factors that could help remedy the defects 12 in the study. 13 Q. Well, if -- if that is the case, that 14 somebody else pushes the button, so to speak, that 15 causes the noise to cause him to raise his firearm, 16 do you think if -- if those are the circumstances and 17 the case, that his conclusions are valid? 18 A. No. 19 Q. Why not? Apart from what you've already 20 said. 21 A. There are a number of other criticisms that 22 don't fit the scientific method here. 23 Q. Scientific method? 24 A. Sure. 25 Q. These police officers are dealing in the</p>

<p style="text-align: center;">Page 209</p> <p>1 scientific method. 2 A. I -- 3 Q. Is that what -- 4 A. I'm sorry. I misunderstood. I thought you 5 were asking me about Mr. Tucker's experiment design. 6 Q. I was. 7 A. Yeah. 8 Q. Not the design. I'm just asking if you 9 thought the experiment -- 10 A. Insofar as a security guard and a retired 11 police chief are conducting something that's being 12 videotaped, I don't think they're acting 13 scientifically. If that's what you're suggesting, I 14 agree. 15 Q. And you think that Lewinski does? 16 A. Yes. 17 Q. Are his experiments peer reviewed? 18 A. Yes. 19 Q. You sure of that? 20 A. I know that a couple that I have seen have 21 been peer reviewed. 22 Q. Okay. 23 A. I've read the documentation. 24 Q. So would you rather modify your answer to 25 say a couple that you know of have, but otherwise,</p>	<p style="text-align: center;">Page 210</p> <p>1 you don't know, do you? They all haven't, have they? 2 A. I don't know all the research that 3 Dr. Lewinski has conducted. There -- 4 Q. Let's look at -- 5 A. Don't cut me off. 6 Q. I'm sorry. 7 A. Knock it off. 8 Q. I'm sorry, sir. I didn't -- I wasn't 9 looking at you. I didn't know you hadn't finished. 10 Relax. 11 A. Just -- just as if I don't know all the 12 research conducted by anyone else, I cannot sit 13 here -- no one can sit here other than Dr. Lewinski 14 and say that all of his research has been peer 15 reviewed. 16 Q. Let me show you one of Dr. Lewinski's tests 17 from the Force Science Institute that you have been 18 certified by and ask you to -- there's two pages. I 19 got this on the Internet, by the way, so there's no 20 secret source here. There's three pages, actually. 21 And they're -- as you can see, they're all under the 22 Force Science Institute that we've been talking 23 about. Some of them are not relevant, but the first 24 three, I think are helpful. 25 MR. BENJAMIN: Can we identify it for the</p>
<p style="text-align: center;">Page 211</p> <p>1 record if you haven't brought copies for us. 2 MR. LILLEY: I brought a copy for the 3 deponent. I haven't gotten a copy for you because I 4 didn't have time, to be honest, but if you want to 5 stop -- 6 MR. BENJAMIN: Are you going to make it an 7 exhibit so we can get it? 8 MR. MARCHESI: Yeah, of course. 9 MR. BENJAMIN: All right. 10 MR. LILLEY: Oh, yeah, it will be an 11 exhibit. It's in this booklet. We'll be sure that 12 anything I talk about is in there. If you want to 13 stop and look at it, you can. Otherwise, I think 14 it's fairly -- 15 MR. BENJAMIN: No. Let's proceed. 16 MR. MARCHESI: Actually, I -- I -- if you're 17 going to show it to my witness and nobody's seen it 18 before, I'd like to look at it before the witness, 19 please. 20 MR. LILLEY: Sure. Is it time to take a 21 break? 22 VIDEOGRAPHER: You've got about 14 23 minutes -- 24 MR. LILLEY: Well, let's -- let's hold off 25 and we'll do it at the break and that will save some</p>	<p style="text-align: center;">Page 212</p> <p>1 time. 2 MR. MARCHESI: Sure. 3 MR. LILLEY: But this is it. Well, wait a 4 minute. I've got to use some other stuff in here, 5 but I'll give it to you of course. Sorry I didn't 6 make a copy. Just didn't have the time, things 7 change at the last minute. 8 BY MR. LILLEY: 9 Q. Let me give you this. I'll do another one. 10 Maybe this will end earlier for reasons other than 11 mine. 12 A. I have Sucrets in the car, if you'd prefer 13 those. 14 Q. Let me see here. I want to show you under 15 Tab 70, and this is -- 16 MR. LILLEY: Again, I haven't -- you guys -- 17 you all -- everybody has these photographs. I just 18 put a number here, and those will also be part of the 19 exhibits. 20 BY MR. LILLEY: 21 Q. But this is a photograph that I assume 22 you've seen before. 23 What -- what number is on the side there? 24 A. Ninety-four. I believe that I have. 25 Q. And it gives you an approximation of where</p>

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1 everybody is. I'm going to look over your shoulder
2 because it never made my book either. At least in
3 terms of the vehicle -- this is taken by the
4 police -- the body, and the house, correct? Just as
5 a general --

6 A. Correct.

7 Q. -- orientation.

8 And do you agree with me at least it appears
9 that the body is a little less than halfway down the
10 driveway?

11 A. So it would seem.

12 Q. Okay. Do you have -- let me just look at
13 this, and I'll help you get through this for the next
14 minutes and maybe faster, maybe not.

15 This is another picture of it. It's
16 Exhibit 145, which will be part of the record. You
17 see there it's kind of a exhibit that looks like a
18 somewhat aerial or drone position up above the
19 ground.

20 Do you see where the body is covered up?

21 A. I do.

22 Q. And you see the police car -- two police
23 cars, one on the right, one on the left, correct?

24 A. The sheriff's car's on the left. The police
25 car's on the right.

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1 Q. Right. And you see you get a -- do you get
2 a -- a feeling for the distance that Mr. Mangino shot
3 McKenney. That's 70 -- 69 feet I'll represent to
4 you, according to the AG's office approximately, I'm
5 sure.

6 A. I -- I believe their measurement seems to be
7 accurate.

8 Q. And at that -- you see how open the area is
9 at that time, the time that he was shot?

10 A. I do.

11 Q. There's really nothing that he was -- could
12 or at least -- maybe he could, but he was not under
13 any -- behind any cover as opposed to the county
14 sheriff's car.

15 Do you agree?

16 A. "He" -- "he" being Mr. McKenney?

17 Q. Right.

18 A. No, he was not.

19 Q. Let me just look at yours again to see if --
20 if it made it into -- I guess it didn't. This isn't
21 numbered.

22 These two exhibits are not numbered, but I
23 will refer to them as the -- the -- I can number
24 them. Let me just -- let me just put an A and a B on
25 them so there's no question.

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1 VIDEOGRAPHER: Ten minutes remaining.

2 MR. LILLEY: Thank you.

3 BY MR. LILLEY:

4 Q. Under A, we have a -- a picture of
5 Mr. McKenney's firearm.

6 Do you see that?

7 A. I do.

8 Q. Do you recall Mr. MacVane testifying that he
9 either kicked that or removed that in some fashion
10 away from Mr. McKenney?

11 A. I -- I think he said kicked. I don't recall
12 specifically.

13 Q. Okay. That is poor -- poor police work to
14 kick a firearm that is cocked in that position, is it
15 not?

16 MR. BENJAMIN: Object to form.

17 BY MR. LILLEY:

18 Q. It's reckless.

19 A. I -- I probably would have picked it up, but
20 picking it up then contaminates the fingerprints. So
21 there's a couple of conflicting values there.

22 Q. Well, there are other ways to get it besides
23 putting your hands on it.

24 A. That depends how much of a hurry you're in,
25 I suppose.

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1 Q. Well, Mr. McKenney was dead, so he probably
2 wasn't going to use it. But in any event --

3 MR. BENJAMIN: Object to form.

4 BY MR. LILLEY:

5 Q. -- you can do it with a -- with a pencil.

6 You can do it with gloves. You can do any number of
7 things, can't you, sir?

8 A. Yeah.

9 Q. Just asking --

10 A. There are other methods.

11 Q. And the danger is if you kick it, it might
12 go off.

13 A. That's a possibility.

14 Q. Look at the next picture, if you will, the
15 picture before that.

16 A. B? It's labeled B?

17 Q. Yes.

18 That picture, B, is the picture that we have
19 of Mr. Mangino testifying that that was the time he
20 felt -- we stopped the videotape, you may have
21 recalled this in his deposition, asked him to tell us
22 where it was that he claimed that Mr. McKenney had
23 pointed the firearm either at him or in his
24 direction. That is the photograph that he picked
25 out. I'll represent that to you.

1 Do you think that looking at that
2 photograph -- and that's the one that Mangino
3 identified, not -- not anyone else.

4 Do you think that that firearm, as you see
5 it in the photograph, is pointing at anybody outside
6 of the sky?

7 A. Not at that moment.

8 Q. And that's the moment, as I said, that he
9 said captured the gun being pointed in his direction.

10 MR. MARCHESI: I -- I object to that.

11 Mr. Mangino has not even yet had the opportunity to
12 read and sign his deposition.

13 MR. LILLEY: He can read and sign it all he
14 wants. It's in there and it's clear. I'll -- I'll
15 send you the -- the deposition or I'll dig it out.

16 MR. MARCHESI: I -- I -- just simply
17 objecting to the question --

18 MR. LILLEY: Okay.

19 MR. MARCHESI: -- just on foundation.
20 BY MR. LILLEY:

21 Q. If that is true, you had -- you did not have
22 the benefit of that -- the -- the picture, did you,
23 or -- or that video at the time you reviewed this
24 case?

25 A. I saw the video in which, very similar to

1 this picture, Mr. McKenney points a gun and
2 (indicating) in this motion, and --

3 Q. This is where --

4 A. -- I think it's taken from this moment right
5 there --

6 Q. This is --

7 A. -- I believe.

8 Q. This is where Mangino, I'll represent to
9 you, said he believed that he was pointing at him,
10 not later when he brings it down and not earlier when
11 he has it in a different position.

12 With that in mind, assuming that I'm
13 right -- I'll represent to you that I believe I am,
14 and I'll dig it out if I have to, if there's time
15 enough -- would the fact that the gun is pointing in
16 the direction it's pointing in give you any pause to
17 believe that Mangino thought the gun was pointing in
18 his direction from the house?

19 MR. MARCHESI: I object to the question as
20 lacking in foundation and misrepresenting record
21 evidence.

22 You can answer based upon the assumption or
23 the hypothetical that the attorney has posed.

24 THE WITNESS: Well, this -- this picture,
25 which I believe to be taken from a frame in a

1 video --

2 BY MR. LILLEY:

3 Q. I just told you where it came from. It
4 was -- came from the frame in the video identified by
5 Mangino as depicting where he pinpoints that
6 Mr. McKenney was pointing the gun in his direction.

7 A. Okay.

8 Q. And I'm asking you, sir, if -- if that's all
9 he's got, do you have some concerns about his version
10 of at least this particular claim that McKenney
11 pointed the gun at him from the house?

12 MR. MARCHESI: Same objection, and I will
13 ask that counsel allow the witness to complete his
14 answer before interrupting.

15 THE WITNESS: No.

16 BY MR. LILLEY:

17 Q. Let's look at -- oh, here it is right here.

18 MR. LILLEY: I'm going to have to mark this,
19 then. Let's take B, and we'll have it marked with --
20 as -- I'm going to have you do this because you've
21 been skating over there.

22 B-1, B-2, and B-3, and that purports to be
23 the -- not only the picture, but Mr. Mangino's
24 deposition referring to the picture and the time
25 element. It's highlighted in the transcript. You'll

1 see, by the way, so that we -- I can anticipate a
2 problem here, that the original tape said 8 rather
3 than 6. It was misread by me from the distance I was
4 from, but all of the other pictures are -- are 8 and
5 that's a -- rather 8 and that's -- it's either 8 or a
6. But it's -- it's the one he identified.

7 MR. MARCHESI: So just to make sure I'm
8 clear, on page 174 of the current unread version of
9 the Mangino deposition where it says 6.31, you're
10 suggesting that that's inaccurate --

11 MR. LILLEY: I'm told that it's an 8 and I
12 misread it.

13 MR. MARCHESI: Well --

14 MR. LILLEY: All of the other -- the -- all
15 of the other video is 8, and he's identified other
16 spots, so it's clearly not any substantive error.

17 MR. MARCHESI: Then you would be very
18 correct that there's -- in anticipating an issue, and
19 that -- simply add that to the objection if you're
20 suggesting that the time reference --

21 MR. LILLEY: Well, you didn't read the third
22 document. Maybe this will help you.

23 If you can see that, which is the original
24 one, it says 8:31. Can you see it? You don't want
25 to look at the truth?

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1 MR. MARCHESI: Mr. Lilley, your editorial
2 comments are unnecessary.

3 MR. LILLEY: It says right -- 8:31 there.
4 If you want to get a magnifying -- do you have a
5 magnifying glass here?

6 MR. MARCHESI: Mr. Lilley, I'm not going to
7 be answering your questions.

8 (Pause in the proceedings.)

9 MR. LILLEY: Just so we can clear this up,
10 Mr. Marchesi, because I don't want to make this a
11 big -- yeah, there you go.

12 It says 8:31. It's the same picture. This
13 is the transcript which, unfortunately, I said 6:31
14 because of my eyes are getting a little weak. And
15 this is the real picture. You can see they're the
16 same.

17 And if you want to look through that, and
18 you don't have glasses, you don't have to wear --

19 MR. BENJAMIN: I don't wear glasses. I
20 don't need them.

21 MR. LILLEY: Can you see that? Can you see
22 it?

23 MR. BENJAMIN: I'm fine.

24 MR. LILLEY: Huh?

25 MR. MARCHESI: Mr. Lilley, what we don't

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1 know is whether the frames that you are representing
2 and the frames that Mr. Mangino was referring to are
3 in fact those frames.

4 So at this point, there's in my judgment, a
5 lack of foundation --

6 MR. LILLEY: I understand. I understand.

7 MR. MARCHESI: -- in addition to the other
8 objections that I've raised which are noted.

9 MR. LILLEY: The other objections I think
10 have been solved by the evidence I've just given you.
11 And so those -- I'm going to need copies of those
12 because those are my only copies.

13 That would be B-1, 2, and 3, is it?

14 (Exhibit B-1, Exhibit B-2, and Exhibit
15 B-3 were marked for identification.)

16 MR. MARCHESI: And I'm objecting to all of
17 these, particularly B-2, because the transcript has
18 not yet been read and signed. It's not final.

19 MR. LILLEY: The transcript, just for the
20 record, as you understand, is only to -- any
21 nonsubstantive issues in which there's an error. You
22 can't change the substance.

23 MR. MARCHESI: That is absolutely --

24 MR. LILLEY: Pardon me?

25 MR. MARCHESI: That is absolutely untrue --

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1 MR. BENJAMIN: You're making that up.

2 MR. MARCHESI: -- just the opposite.

3 MR. LILLEY: I'm not making that up.

4 MR. MARCHESI: Of course you are. Either
5 that or you're misapprehending the substance of the
6 rule.

7 MR. BENJAMIN: Are we taking a break now?

8 VIDEOGRAPHER: I have twenty seconds left.

9 MR. LILLEY: Yeah, we're taking a break.

10 VIDEOGRAPHER: Going off the record. It is
11 2:43.

12 (Short recess taken.)

13 VIDEOGRAPHER: This is Tape No. 4 in the
14 videotaped deposition of Kenneth Wallentine. The
15 time is 2:55. We're back on the record.

16 BY MR. LILLEY:

17 Q. If you'll look at Tab 75 in the book I tried
18 to put together here, or you did. I -- my office
19 did, I should say.

20 You see we have a -- an article here,
21 "Canada warned about controversial police shooting
22 expert."

23 Do you see that?

24 A. I do.

25 Q. Have you read that before?

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1 A. No.

2 Q. Did you know that -- that he was declined,
3 that they -- I'm going to say throw him out because I
4 think that's what it says of Canada because of his
5 less than accurate testimony they found, at least
6 in -- in Calgary, Canada?

7 MR. MARCHESI: I object. Form. Foundation.
8 Hearsay. All rules of evidence.

9 THE WITNESS: I don't know anything about
10 it.

11 BY MR. LILLEY:

12 Q. Don't know anything about it?

13 A. (Shakes head.)

14 Q. This is a case that when he testified that
15 the police was -- were justified that -- in shooting
16 the suspect, but they shot him in the back.

17 Have you heard about that case up in Canada?

18 MR. MARCHESI: You're asking him about
19 Lewinski being disqualified?

20 MR. LILLEY: Of course I am. That's what
21 the article is about.

22 MR. MARCHESI: I object.

23 THE WITNESS: I -- I see that it's dated
24 2013. I -- you know, I -- perhaps I heard something.
25 I don't know. Nothing comes to mind right now.

1 BY MR. LILLEY:

2 Q. Have you read anything about the prosecutor
3 in the -- in the -- a federal court saying that
4 Mr. Lewinski was suspect in terms of his credentials
5 and his ability to testify to some things he has
6 testified in courts of law about in general?

7 MR. MARCHESI: Objection. Form.
8 Foundation. Hearsay. Relevance.

9 THE WITNESS: No.

10 BY MR. LILLEY:

11 Q. Or -- and -- and have you heard anything
12 from the -- the Los Angeles prosecutor? Have you
13 ever read any -- any comments he made on articles --
14 in articles that suggest that he felt that Lewinski
15 was going way over the -- the line in terms of some
16 of his opinions?

17 MR. MARCHESI: Same objection.

18 THE WITNESS: No.

19 BY MR. LILLEY:

20 Q. Do you think he's the top guy in the field
21 of law enforcement with regard to the use of force?

22 MR. MARCHESI: Objection. Form.

23 Foundation. Relevance.

24 THE WITNESS: No.

25 ///

1 BY MR. LILLEY:

2 Q. Who do you think is besides yourself?

3 A. I'm certainly not on top. What -- in -- in
4 what particular aspect?

5 Q. Deadly force --

6 A. The human --

7 Q. -- similar to what we're dealing -- dealing
8 with here.

9 Testing and -- and -- and scientific
10 approaches to seeing what works and doesn't work in
11 cases of confrontation that we had in this case.
12 Who's the guru?

13 MR. MARCHESI: Objection. Form.

14 THE WITNESS: I -- you know, I don't know.
15 There -- there are a number -- there are a number of
16 folks out there that cross different disciplines.

17 But of the people who -- who deal specifically in the
18 science of biomechanics and human factors, I -- I
19 don't know who I would say is at the -- the very top.

20 BY MR. LILLEY:

21 Q. Had you -- before this case, had you heard
22 of Mel Tucker?

23 A. Yes.

24 Q. Okay. Do you -- did you know -- do you know
25 him, either by person or by reputation?

1 A. I don't believe we've ever met.

2 Q. Do you know what his reputation is in the
3 field of law enforcement?

4 A. I -- I -- I don't know that he's active in
5 the field of law enforcement. I don't know. I
6 really haven't heard that much about it.

7 Q. Well, I mean, he has been. He's semiretired
8 now, like I guess you're aware. I'm not sure.

9 You've never heard anybody comment about
10 whether he was capable in the field or any of that or
11 not capable as the case may be? I'm talking about
12 his reputation.

13 A. Not -- sure. Not that I recall.

14 Q. Okay. If you'll take a turn back, if you
15 will, to -- I think it's the very first -- the --

16 A. The pictures?

17 Q. Yes. The Force Institute pictures.

18 A. Oh, these?

19 Q. Yes.

20 A. Okay.

21 Q. The first one is called the bootleg position
22 that we talked about.

23 Do you remember that?

24 A. Yes, I do.

25 Q. And you understand the bootleg position is

1 where the -- in this case, it happens to be a police
2 officer in this -- in this experiment. Well, let --
3 let me read it to you and ask you some questions.

4 Description -- this is on the -- the Force
5 Science Institute. This is Mr. Lewinski's company,
6 correct?

7 A. I don't believe that it's a company. I
8 don't know.

9 Q. Or -- or business.

10 A. I don't believe that it's a business. I
11 believe that it's part of the -- the university
12 system there, the institute is part of the
13 university.

14 Q. Well, he heads this up.

15 Do you agree?

16 A. I -- I think he does. That's my
17 understanding.

18 Q. And -- and he's the one that got you
19 certified through the Force Science -- Force Science
20 Institute, limited, did he not?

21 A. I don't recall seeing the term -- doesn't
22 matter, but I don't believe he actually administered
23 the tests that I took, but I don't know.

24 Q. Was -- was he involved in your
25 certification?

1 A. Yes. He was one of the instructors in the
2 course that I took.
3 Q. The description here is, The bootleg
4 position is the name I have given -- this is
5 Mr. Lewinski -- the weapon placement position." And
6 we've talked about that. Officers will, for a
7 variety of reasons, pull their weapon from" the --
8 "their holster and place it behind their strong thigh
9 so that it is not readily visible but it is readily
10 available. Because it is used by street officers,
11 the movement of the weapon from behind the thigh to
12 the common firing position was measured. The
13 officers were instructed to place the weapon in
14 position behind the thigh, and when a buzzer went off
15 to as quickly as they could raise the weapon to an
16 extended arm firing position, get a sight picture and
17 fire one round.

18 Do you see that, where I'm reading?

19 A. Correct.

20 Q. And -- and then he has put down that -- the
21 times. And under that is, Action. Raise the weapon,
22 acquire sight picture, fire one round -- excuse me,
23 again. I'm so sorry for this, but I -- I can't --
24 can't do much about it -- average time was .92
25 seconds.

1 enforcement, no.

2 Q. Well, what is he an expert in?

3 A. Human factors involved in -- in
4 confrontations, principally deadly force
5 confrontations.

6 Q. Okay.

7 A. But this is a guy who would know nothing
8 about -- some of the things you asked me about
9 before, like probable cause, search and seizures --

10 Q. Oh, no, no, no. I -- I'm talking about his
11 research and his development and his teaching in the
12 area of deadly force.

13 He's certainly a -- an authority in that
14 area, is he not?

15 A. I certainly would recognize him as an
16 authority in the area of force science, but police
17 science generally --

18 Q. Okay. I see a distinction.

19 A. -- no.

20 Q. And the kind of thing we just read about,
21 the bootleg position and -- that -- that the -- the
22 shot clock and the average time, those are things
23 you've actually seen him do or seen that institute
24 do; is that correct? At least in the car setting,
25 automobile setting.

1 Do you see --
2 MR. MARCHESI: Okay. I --
3 BY MR. LILLEY:
4 Q. Do you see where I'm reading?
5 MR. MARCHESI: I'm objecting to the use of
6 this document. It's never been shared before.
7 Copies haven't been provided to counsel, and there's
8 no foundation as to whether what you're showing this
9 witness is complete, what context it was made in, and
10 it's clearly hearsay.

11 So I think it's entirely inappropriate. I'm
12 certainly going to allow the witness to answer the
13 questions, but I will state that objection, and I
14 will reiterate it with respect to each and every
15 question regarding these documents.

16 MR. LILLEY: Let -- let me follow up on
17 that.

18 BY MR. LILLEY:

19 Q. You -- you recognize Lewinski as a -- as an
20 authority in the field of law enforcement generally,
21 do you not? And there are others, but he is one, is
22 he not?

23 A. No.

24 Q. He's not a -- he's not an expert?

25 A. Not generally in the field of law

1 A. Correct. I have not seen this particular --
2 I mean, I --

3 Q. Okay.

4 A. I recognize the format of this document, but
5 I've not seen --

6 Q. All right.

7 A. -- this particular activity.

8 Q. This -- by the way, it's on the Internet.

9 In the second page, if you'd turn the page,
10 it's a follow-up. It's the next test that he
11 performs, "Officer-Subject Interaction" it's called.
12 And it has some measurements here.

13 A. Hold on. I -- the next --

14 Q. Oh, you may have --

15 A. The next page is not what I have.

16 Q. Then let's -- oh, boy.

17 Let me see what the next page is. Yeah --
18 that's it.

19 A. Is it this one?

20 Q. I'm sorry, it's the third page.

21 A. Okay.

22 Q. We had it mispaginated.

23 So your third page, my second page, so the
24 record will be clear, "Officer-Subject Interaction."
25 It says, "The officer-subject interactions are almost

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1 unlimited. A sample is included here to clarify,
2 illustrate the relationship between the two as well
3 as well as the general and dramatic difference
4 between a motion that is in action, subject to
5 movement, and the catch-up reaction motion to the
6 officer."

7 Did I read that right?

8 MR. MARCHESI: Same objection as previously
9 noted.

10 You may answer.

11 THE WITNESS: Yes.

12 BY MR. LILLEY:

13 Q. And if you look down at the bottom frames,
14 the timing with trigger pull reaction, that would be
15 the other half of the team in this experiment, the
16 person who has the gun on the suspect, the timing
17 he's got down for that is .54 seconds.

18 Do you see that?

19 MR. MARCHESI: Same objection.

20 THE WITNESS: I see that.

21 BY MR. LILLEY:

22 Q. If you do the math, these .92 and .54, these
23 are milliseconds, I guess, aren't they?

24 A. It's 5/10 of a second roughly or 54/100 of a
25 second.

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1 Q. Right. Are they called milliseconds?

2 A. Ninety-one --

3 Q. I'm not sure to be honest with you.

4 A. No, hundreds. The milliseconds would be out
5 to the next --

6 Q. Okay.

7 A. -- the -- the next -- I'm not a math guy,
8 but the next place.

9 Q. Okay. Well, in any event, with regard to
10 Mr. Lewinski's experience, at least as he's published
11 it on the Internet, it takes the shooter, otherwise
12 known as a police officer in the -- in the -- in the
13 scenario, 54 seconds to -- to shoot the suspect. And
14 the suspect 92 seconds to aim and fire at the
15 officer.

16 Do you understand the difference?

17 MR. MARCHESI: Same objection.

18 BY MR. LILLEY:

19 Q. This is Lewinski now.

20 A. In -- okay. Well, in two -- so what you
21 have here are some synopses of -- and there are far
22 more intensive documents associated with these, but
23 the first one, for example, to have -- there isn't an
24 officer and a suspect here. Here it's simply --

25 Q. Two officers.

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1 A. Not in the -- not in the first one.

2 Q. Well, the officer -- the officer in the
3 first one has a gun. He happens to be a police
4 officer.

5 They're usually done with police officers,
6 aren't they?

7 A. Some of them are, and -- and some are done
8 with -- he's -- he's taken people out of the
9 community, and he's also used college students in his
10 psychology classes. They're the easiest guinea pigs
11 to get.

12 Q. Right. He uses students and -- and some
13 other folks. These are actually trained police
14 officers, though. So presumably they would be a
15 little faster on the draw, so to speak.

16 Do you agree?

17 MR. BENJAMIN: Object to foundation.

18 MR. MARCHESI: Join the objection. As well
19 as the objection previously noted.

20 BY MR. LILLEY:

21 Q. In other words --

22 A. I don't --

23 Q. -- the person that's got the gun down by his
24 side, similar, I'm going to suggest to you, that --
25 that Mr. McKenney had it, is a trained police officer

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1 as opposed to a civilian.

2 Do you understand that to be the case?

3 MR. MARCHESI: Same objections. Please let
4 the witness answer.

5 THE WITNESS: I -- I don't recall whether --
6 I've seen more intensive documentation of this
7 particular activity, and I don't recall whether this
8 man is a police officer or not and --

9 BY MR. LILLEY:

10 Q. Well, hold on, hold on.

11 MR. MARCHESI: Please let him finish his
12 answer.

13 BY MR. LILLEY:

14 Q. Are you finished?

15 A. No.

16 And in this one, I will tell you that it is
17 my understanding -- this is just a -- this is a --
18 kind of a gross synopsis pamphlet, like it's my
19 understanding this man was not involved in this
20 activity.

21 Q. Now hold on, sir. All I'm doing is -- is --
22 is -- is suggesting to you that your -- your --
23 Mr. Lewinski who wrote this, I'll tell you, and
24 there's an article that goes with it that goes into
25 who he recruited, which I think you're right -- he

1 suggested, by the way, that he recruited people,
2 students who were students at the police academy, but
3 students. In this particular case, he used a police
4 officer, as he says here, I -- I take him at his
5 word, to -- to be the -- the so-called suspect. And
6 see how fast he could raise his -- his gun. That was
7 when the -- when the buzzer went off. That's all
8 that that first page purports to do.

9 Do you understand that?

10 A. I do.

11 MR. MARCHESI: And same objection.

12 BY MR. LILLEY:

13 Q. And then with regard to the next page, this
14 officer, the trigger pull reaction sighted, that
15 means he's got the sights -- his eye on the sights
16 similar to, I would suggest to you, Mangino had in
17 our case, to pull the trigger to a reaction to an --
18 to the other person pulling a gun takes 54 seconds.

19 Do you understand that that's his finding?

20 MR. MARCHESI: Same objection.

21 THE WITNESS: I don't know that that's what
22 the parenthetical sighted means, and I don't know, as
23 I stated, that this individual pictured here, which
24 you said is a police officer, I don't know --

25 Q. Well, it says it.

1 MR. MARCHESI: On top of that, Mr. Lilley,
2 you've just indicated that you don't have time to
3 provide the witness with the article. So you're
4 asking him to comment on one limited part of it while
5 you're acknowledging that you have reviewed but are
6 denying the witness the opportunity to review the
7 whole of it.

8 MR. LILLEY: No, I haven't done any such
9 thing. First of all, I didn't print it out, and it
10 goes on to other kinds of things in the other
11 pictures such as high ready, the so-called Hollywood
12 high guard, and things that were not relevant.

13 MR. MARCHESI: Well --

14 MR. LILLEY: So I don't -- I don't apologize
15 for that. This is simply his picture of his
16 experiment, and he summarized it himself,
17 Mr. Lewinski.

18 MR. MARCHESI: And you're asking this
19 witness to comment on it without providing him the
20 whole of it.

21 MR. LILLEY: Well, it's --

22 MR. MARCHESI: I'd add that to the objection
23 previously --

24 MR. LILLEY: It's provided in the -- in the
25 Squibb, too, and it's not very complicated. He says

1 A. I don't know if, A, he's a police officer,
2 and I don't know, B, if he participated in this
3 activity.

4 I believe from seeing the videos that he did
5 not.

6 Q. Okay. Who did not?

7 A. The man who is pictured here above the
8 caption that you just read.

9 Q. Okay. You -- you -- if you look at the
10 bootleg position, the very first document, it says in
11 there, assuming we can believe what he says, the
12 officers that -- that -- he did this more than once
13 with other people. And if you want to look at the
14 study, I -- I don't have time to provide it today nor
15 did I do any more than read it. I didn't print it
16 out.

17 The officers were instructed to place the
18 weapon in a position behind the thigh, and when a
19 buzzer went off to as quickly as they could raise the
20 weapons to an extended position, firing position, get
21 a sight picture, and fire one round.

22 You understand that's what it says at least.

23 MR. MARCHESI: Same -- same objection.

24 MR. LILLEY: I understand your objection.

25 Why don't you just leave it --

1 what it is, and he says what he got for time.

2 BY MR. LILLEY:

3 Q. Assuming that that is in fact a action
4 versus reaction -- assume for the moment with me, and
5 I'm not asking you to agree with me if you don't.
6 You can certainly have that reservation -- at least
7 on this, the average time for the person -- the
8 police officer would react to the -- to the suspect
9 raising his weapon and firing one round, the officer
10 has a 2 to 1 advantage, does he not?

11 MR. MARCHESI: Objection. Same basis.

12 BY MR. LILLEY:

13 Q. At least on these pictures.

14 MR. MARCHESI: Same objection.

15 BY MR. LILLEY:

16 Q. And I strongly suggest you'd look online and
17 you'll see this is not a secret document.

18 MR. MARCHESI: Same objection.

19 MR. LILLEY: Why don't you just simply
20 object to this whole area and then we don't have
21 to --

22 MR. MARCHESI: I'm going to object on a
23 question-by-question basis.

24 MR. LILLEY: All right. I'll assume you
25 object to every question. How's that?

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1 MR. MARCHESSI: No. I'll make my objections
2 as I see appropriate.

3 THE WITNESS: As you ask, it's -- it's not
4 quite that simple.

5 For example, what you have here is a sighted
6 trigger pull response, which may or may not be
7 analogous to a novice shooter, of .54 seconds.

8 What you see here is a -- what is purported
9 to be a sighted picture from a -- some people call
10 that bootleg. That's -- as he points out, that's the
11 name he gave the -- the position.

12 BY MR. LILLEY:

13 Q. We talked about it earlier today.

14 A. Sure. And you see the range of .55 to
15 point -- 1.88. So --

16 Q. No, no, no. Hold on. Hold on, sir.

17 A. Please let me finish my answer.

18 MR. MARCHESSI: Please allow him to finish.

19 THE WITNESS: So really -- really in at
20 least -- at least in one of the scenarios described
21 on your synopsis of the research activity here, the
22 distinction between the subject action and the
23 officer reaction, if you want to take these two very
24 different designed, different -- executed at
25 different times and different peoples and different

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1 controls research that's reported only in the
2 synopsis here, you're talking about one situation and
3 the other. The difference of 1/100 of a second.

4 BY MR. LILLEY:

5 Q. Sir, are you trying to be fair in this
6 deposition? Are you trying to be intellectually
7 honest?

8 A. I -- I am. What I'm trying to do is hold
9 you to intellectual honesty.

10 Q. Well, then let's try it?

11 A. Okay. Let me --

12 Q. It's says the average time --

13 A. Let me finish my answer to that.

14 What I'm trying to is hold you to the
15 intellectual honesty of recognizing the -- and -- and
16 probably through no fault of your own, but someone
17 has pulled for you, or you have pulled, synopses of
18 standalone experiments conducted at different times,
19 different people, different controls with different
20 actions, and you're trying to take an overlay now and
21 say, well, in this particular situation, I draw the
22 conclusion and I compare it to the conclusion I draw
23 on this particular situation. But you have to
24 recognize that in both situations, there's a range.

25 Now, you've given me the range in one of

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1 them, .55 seconds. So half of a second, essentially,
2 to 1.88 seconds. In the other one, I don't see that
3 you've provided me a range.

4 Q. Sir --

5 MR. MARCHESSI: Please let him finish.

6 THE WITNESS: So I don't know whether this
7 is an average or whether this is one individual.

8 BY MR. LILLEY:

9 Q. Then look at the words "average time" above
10 92 seconds. It's not the low and the high, sir.
11 You're misstating it, not me, when we talk about
12 intellectual honesty.

13 A. Sure.

14 Q. If you look at it, it says the action.
15 Let's go through it word by word.

16 The action is "Raise the weapon, acquire
17 sight picture, fire one round." Then there's a box
18 that says "Average time." Not low time and high time
19 as you try to suggest, but the average time is
20 .92 seconds. That means there probably were some
21 above and some below.

22 Do you agree that that's what average
23 generally would mean in this context.

24 MR. MARCHESSI: Same objection. Same
25 objection.

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1 THE WITNESS: I agree that you just captured
2 the essence of the problem.

3 BY MR. LILLEY:

4 Q. Right. Well, the essence of the problem is,
5 sir, is you're -- you're trying to suggest 92 seconds
6 is the low, but it's the average --

7 A. No.

8 Q. -- isn't it?

9 Okay. In any event, I'm not going to argue
10 and spend a lot more time on this except to suggest
11 to you that the average time of these -- these
12 different studies, and you -- if you want to look at
13 how many there were and how they averaged it, who the
14 people they got, you may do so.

15 This is what he put out on his -- his
16 website, that the 92 --

17 MR. MARCHESSI: Okay. Is that a question?

18 MR. LILLEY: I'm not finished yet.

19 MR. MARCHESSI: All right.

20 BY MR. LILLEY:

21 Q. 92 seconds in one and 54 seconds and the
22 officer who has the trigger pull reaction.
23 Regardless of if -- you know, whoever is on the other
24 side, whether he's an old man, a young man, a -- a
25 SWAT team person or -- or uneducated in the use of

1 firearms, the person who has the gun on him, the
2 trigger pull reaction, the Mangino trigger pull
3 reaction is .54. That's the point of the -- of
4 the -- of the study that I'm trying to suggest to
5 you, suggested in this kind of a case, a reaction
6 beats action, not the other way around as the mantra
7 has been for years.

8 MR. MARCHESSI: I object --

9 BY MR. LILLEY:

10 Q. Do you understand that?

11 MR. MARCHESSI: I object to Counsel's
12 question. To the extent it is a question, it
13 appears --

14 BY MR. LILLEY:

15 Q. Do you understand that, sir?

16 MR. MARCHESSI: -- to be well suited for
17 closing argument.

18 THE WITNESS: I -- I do understand that
19 somewhere in that narrative, you captured the
20 important point. And that is, when you said the
21 difference in these different studies, because what
22 they are, again, is synopses of different studies
23 conducted under different times, different people,
24 different controls, different objectives, and you're
25 correct, the average time in one, which you've given

1 me is .92. The range in that same one is .55 to
2 1.88.

3 BY MR. LILLEY:

4 Q. Okay.

5 A. What you've not given me in a totally
6 unrelated and distinct and separate study done under
7 a different time under different controls, different
8 people and different purposes, is you've not given me
9 an average. You've given me a number here, and --
10 and as I said, I'm quite confident this man was not
11 involved in this activity. So I'm not sure what this
12 means. I get it, it was on the Internet, but there's
13 also --

14 Q. Okay. Well --

15 A. -- on the Internet somebody will tell you
16 that -- that there are people living on Mars.

17 Q. Okay, sir, and maybe that's what Lewinski
18 believes, but all I can tell you -- and perhaps
19 that's why he's not allowed to testify in Canada.

20 But all I can tell you, sir, is that this
21 comes from his study, and I will send this article,
22 the whole article, I'll go back and print it off, and
23 I'll send it to your counsel. And your counsel can
24 decide what he wants to do with it.

25 But I can assure you that if there's a

1 trial, we'll be coming back to this. And I hope I
2 won't hear that you didn't have enough information.

3 MR. MARCHESSI: Objection.

4 THE WITNESS: You'll probably hear who's on
5 first, what's on second. I don't know who's on
6 third --

7 BY MR. LILLEY:

8 Q. Probably I will --

9 A. -- because that's what this is. And -- and
10 by that time, maybe someone can help you sort out why
11 there's a problem --

12 Q. Maybe you ought to read the article first
13 before you criticize my interpretation of it. Don't
14 you think that would be a good idea?

15 MR. BENJAMIN: Provide it to us.

16 MR. LILLEY: Well, you've got a -- you've
17 got a computer. I don't think you need any more than
18 those -- I don't think Lewinski is going to put those
19 pictures out and -- and suggest something other than
20 what he said.

21 MR. MARCHESSI: Well, that's why we have
22 rules of evidence, so we don't --

23 MR. LILLEY: That's right. And I can't wait
24 until they're in effect, and then maybe you'll be
25 subjected to it and we won't hear so much from you.

1 BY MR. LILLEY:

2 Q. Okay. So let's move on. Now --

3 MR. MARCHESSI: Do you charge more or less
4 for the entertainment value?

5 BY MR. LILLEY:

6 Q. Now, with regard to this whole area of
7 timing, do you know -- or did you -- did you
8 determine from your analysis in this case how long it
9 was that Mr. Mangino was behind his truck and had his
10 rifle trained in the direction, if not directly on to
11 Mr. McKenney, in terms of probably seconds or
12 minutes?

13 MR. MARCHESSI: Objection. Form.
14 Foundation.

15 You can answer.

16 THE WITNESS: Sure. I -- I -- I considered
17 a timeline of evolving events. I can't tell you from
18 memory today what that -- what that particular
19 envelope of time was.

20 BY MR. LILLEY:

21 Q. Well, I mean, do you at least agree that
22 Mr. Mangino's firing against Mr. McKenney was not one
23 of those situations that are sometimes referred to as
24 split-second decisions?

25 A. I'm honestly not sure what that means,

1 but --

2 Q. Well, let me --

3 MR. MARCHESSI: Please let him finish.

4 BY MR. LILLEY:

5 Q. You want me --

6 A. But -- but this was not -- this was not like
7 many cases where courts have used the term "split
8 second" to mean that a -- a stimulus arises and the
9 officer is required with no other information
10 available to make a decision in a split second.

11 Q. Right. Because, in fact, Mr. McKenney,
12 we've said so many times, was walking down his
13 driveway, nonchalantly with his gun dangling to his
14 right side for a number of seconds, if not a
15 number -- or perhaps even a minute or two.

16 Do you agree? From what you're review is?

17 MR. MARCHESSI: Objection to form.

18 THE WITNESS: He was walking down his
19 driveway with his gun held at his side, and I cannot
20 tell you the precise number of seconds. I think we
21 can figure that out, but I don't remember what it is.

22 BY MR. LILLEY:

23 Q. Okay. Well, one officer, Officer Fournier,
24 I think testified -- he didn't testify, in his
25 interview, I can't remember the source, that he

1 thought it was -- from where -- from where McKenney
2 got. Now, he only got down the driveway, in my view,
3 around a third of the driveway, maybe 40 percent,
4 that at that point, from the time he left the house
5 walking down the driveway, whether it was toward
6 Mangino or just at the end of the driveway, was
7 approximately nine seconds.

8 Do you recall that?

9 MR. MARCHESSI: Objection to form.

10 BY MR. LILLEY:

11 Q. I'll submit to you --

12 A. It's somewhere in that neighborhood.

13 Q. Okay.

14 A. I don't know whether it's in the interview
15 or the report. I haven't seen his deposition,
16 however.

17 Q. And then Mr. Mangino makes the decision
18 because he's very scared, as he said, he doesn't know
19 what's going to happen, and he thought he possibly
20 might be the victim of lethal force, decides that
21 he's going to shoot him.

22 So it's not on a split-second basis on that
23 basis. Do you agree?

24 MR. MARCHESSI: Objection. Form.

25 THE WITNESS: I -- I agree.

1 BY MR. LILLEY:

2 Q. And have you looked at -- let me ask you:
3 It occurs to me, if Mr. McKenney -- strike that.

4 If there was no probable cause to -- to
5 arrest or -- Mr. McKenney for a crime, then how can
6 there be probable cause to believe that lethal force
7 is going to be used against you as an officer --

8 MR. BENJAMIN: I'll object to -- I'll
9 object.

10 BY MR. LILLEY:

11 Q. -- meaning unlawful force?

12 MR. BENJAMIN: I'll object to the force of
13 the question because that's a legal test.

14 MR. MARCHESSI: Objection to form.

15 MR. LILLEY: I'll change it to -- to deadly
16 force.

17 MR. MARCHESSI: Same objection.

18 MR. BENJAMIN: Same objections.

19 BY MR. LILLEY:

20 Q. If he's not guilty of a crime, there's no
21 probable cause of that, how can there be probable
22 cause to shoot him?

23 MR. BENJAMIN: Same objection.

24 MR. MARCHESSI: Same basis.

25 THE WITNESS: I -- I'm not sure how to

1 answer that, because as I've said, and I think you
2 and I both understand quite well, we're -- we're now
3 creating an admixture of legal doctrines. As far as
4 I know, there are no jurisdictions in which the
5 deadly force statutes, certainly our -- our courts
6 have not talked about legitimate deadly force as
7 being assessed by a probable cause standard.

8 BY MR. LILLEY:

9 Q. Well, probable cause to believe that he's in
10 imminent danger of a victim of deadly force.

11 Isn't that what they say?

12 MR. BENJAMIN: Same objection.

13 MR. MARCHESSI: I object. The standard is
14 reasonable belief not probable cause.

15 MR. LILLEY: Please don't interfere with my
16 deposition. You've got an objection, you can object
17 to the form.

18 MR. BENJAMIN: I'll object that you're
19 making up a --

20 (Clarification by the Reporter.)

21 MR. BENJAMIN: -- legal test --

22 MR. LILLEY: Now, you're --

23 MR. BENJAMIN: -- that doesn't exist. It's
24 the basic premise to your question.

25 MR. LILLEY: Let's me just see here. There

1 are too many books.

2 THE WITNESS: Well, I suppose you could
3 always go the route of Mr. Marchesi and have
4 everything on a thin little piece of --

5 MR. LILLEY: Yeah, that's probably the way
6 to go.

7 MR. MARCHESI: This is the route of Don
8 Leach. Until I met Don Leach, I came with all my
9 books like Mr. Lilley did. But as you know Don as I
10 do, it's all on the laptop. And he's far more adept
11 than I'll ever be.

12 MR. LILLEY: The problem is I've missed
13 the --

14 MR. MARCHESI: What are you looking for,
15 Dan?

16 (Pause in the proceedings.)

17 BY MR. LILLEY:

18 Q. Let's turn to -- let's turn to the -- do you
19 have the photographs there that -- yes, you do.

20 Can you turn to -- they've marked it 71, and
21 these appear -- appear to be -- and, again, I got
22 these off the Internet, but these apparently are
23 authored by you. They're -- they're -- they look
24 like -- well, you -- you look them over.

25 Do you see your initials on all these? KRW,

1 is that your initials?

2 A. It is.

3 Q. It looks like some training exercise that
4 might have been handled by you in 2010, the date is.

5 Do you recognize those as having been
6 authored by you?

7 A. I believe so. I think it looks like it's
8 all mine.

9 Q. And it says "Use of Force Chief Ken
10 Wallentine."

11 Is it tine or teen?

12 A. Tine.

13 Q. Tine. And the Utah Attorney General, and
14 that's the gentleman you work for -- several
15 gentlemen that you work for, correct?

16 A. Correct.

17 Q. And what is this anyway, Mr. Wallentine?

18 A. This, I believe, is a basic presentation to
19 go along with a course presented in basic training at
20 the Utah police academy.

21 Q. Okay. Now, we understand, do we not,
22 that -- I know this is basic, but I think it should
23 be in the record.

24 The taking of another human being's life is
25 homicide or murder, generally, correct?

1 MR. MARCHESI: Objection.

2 THE WITNESS: Well, among my cousins of
3 doctors, you'll find a pathologist. It's homicide.
4 It's not necessarily murder.

5 BY MR. LILLEY:

6 Q. Okay. Homicide. I'm -- and there are --
7 there are justifications, war and self-defense and
8 police and all that. But generally, taking another
9 human being's life is homicide.

10 A. Homicide is a manner of death. Murder is a
11 legal conclusion.

12 Q. Okay. And if there's no justification, the
13 legal conclusion would be murder, would it not?

14 MR. MARCHESI: Objection. Form.

15 (Clarification by the Reporter.)

16 THE WITNESS: In some circumstances. I'm
17 sorry.

18 BY MR. LILLEY:

19 Q. In some circumstances?

20 A. Okay.

21 Q. Well, I'm going to leave that there because
22 I don't want to get into that.

23 Let's -- let's look at some of these. Are
24 these PowerPoints that -- looks to me like
25 PowerPoints for your presentation.

1 A. I don't know whether they were PowerPoint or
2 the -- the Word Perfect equivalent.

3 Q. But you're teaching --

4 A. Slide shows.

5 Q. Okay. You're teaching this to law
6 enforcement people of some kind, correct?

7 A. I could have been or someone -- there are a
8 number of instructors that teach at the police
9 academy. Someone else may have used my materials.

10 Q. But they -- they were authored by you.

11 A. I haven't gone through each page, but I
12 wouldn't expect that anybody changed my materials.

13 Q. Well, they might have, but I don't -- I
14 didn't, I can tell you.

15 But if they say 2/10 KRW, can we assume at
16 least that it's your work product?

17 A. Sure.

18 Q. So let's go through a couple of these, if we
19 can. The first one says "Objectives."

20 And it looks like you're talking about
21 definitions, and I -- I don't want to go through all
22 of these, I can assure you. But you say in your
23 second list of objections [sic], you say, "How close
24 is too close?"

25 Do you see that?

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<p>1 A. I do. 2 Q. That's Tueller's famous article, isn't it? 3 A. It is. 4 Q. So you teach Tueller in these courses? You 5 teach some of his -- his concepts or his -- his -- 6 his information? 7 A. In 2010, I taught to the objectives defined 8 by the police academy staff, and that was part of it. 9 So yes, I -- if I taught this class in 2010, I'm 10 pretty sure I discussed that. 11 Q. And it says "Reporting force: Questions to 12 answer." You then have a -- a bullet that says 13 "Avoiding liability for the use of force." 14 So I take it you're telling the police or 15 some law enforcement of some kind how to avoid 16 getting sued for using force, or at least that's what 17 the -- 18 A. Not really. 19 Q. -- PowerPoint would suggest. 20 No? 21 A. PowerPoint might suggest that, correct. 22 Q. What would it be suggesting, then, when it 23 says "Avoiding liability for use of force"? 24 A. Conducting themselves in -- in a way that 25 they're not ever exposed to liability.</p>	<p>1 Q. Okay. Then you go on to the next one that 2 has a can on the top of it. It says "Whoop ass." 3 A. Mm-hmm. 4 Q. Are these -- these little cans and -- and 5 jokes on the side, an effort to keep the class alive 6 or open or -- 7 A. It's typically a warm afternoon with 8 brand-new recruits -- 9 Q. Okay. 10 A. -- that don't -- they would rather be out 11 driving cars with sirens. 12 Q. Okay. So you want to have a little levity, 13 a little humor with your -- 14 A. Sure -- 15 Q. -- your deadly force classes; is that 16 correct? 17 A. This is not a class on deadly force. 18 Q. Okay. "Justification, it says, the next 19 one, "means that a person is exempt from criminal 20 liability," you say, right? You've got a quote, 21 justification. 22 Am I reading it right? 23 A. Sure. 24 Q. And then you say "Justification excuses an 25 officer from general consequences of the use of</p>

<p>Page 261</p> <p>1 A. I'd have to get the statute. But, again, 2 that is a direct quote from the statute. The next 3 page has a direct quote. 4 Q. Hold on, sir. Let's not go there. 5 MR. MARCHESSI: Please allow him to finish. 6 BY MR. LILLEY: 7 Q. No, no, no. We're going to stay with this 8 one. 9 A. When you say my words, I -- 10 Q. I'm saying you using likely. That's all I'm 11 saying. Simple as that in this? 12 A. I did. I accurately copied language from a 13 law book. 14 Q. And -- and that's what the law book says, 15 both in apparently Utah and in the -- the federal law 16 too; is that correct? The case law. 17 A. There are some variants, I think, in federal 18 courts, but that -- that's pretty close. 19 Q. And then beside that, you have a little joke 20 here, double suicide, strychnine filled chocolate 21 truffles, make your love last forever, correct? 22 A. Mm-hmm. 23 Q. Yes? You have to say yes or no. 24 A. Yes. 25 Q. I'm not going to go through them all.</p>	<p>Page 262</p> <p>1 Let's not do the next one or the next one. 2 The next one talks about force in defense of 3 person -- any reasonably -- any force reasonably 4 necessary force -- excuse me, any reasonably 5 necessary force, and then you talk about no general 6 duty to retreat. I'm just doing -- let me see if I 7 can pick one here that I can ask you about. 8 And then you talk about deadly force may be 9 used when reasonably necessary to prevent death or 10 serious bodily injury, and under that you put, "Not 11 if you provoke the force." 12 What do you mean by that? 13 A. I meant to synopsize, and I think I 14 accurately did, the Utah Code because this is a 15 presentation on Utah law presented to Utah law 16 enforcement. 17 Q. It's also the same law, is it not, on the 18 national level? Or do you think Utah is different? 19 A. I -- I don't know. But you're asking me 20 about specific word choice, and I'm telling you that 21 I used words in this presentation to teach Utah law 22 to people that are going to be tested -- 23 Q. I understand. 24 A. -- to be tested on concepts and, frankly, 25 tested on language that is very similar to what's</p>
<p>Page 263</p> <p>1 here. 2 Q. Okay. And I don't care what the source is. 3 I'm just suggesting to you that the source -- that -- 4 that the law that you're talking about is the same in 5 the federal system as it is in Utah, is it not? 6 A. Okay. 7 Q. Is that -- do you agree? You don't have to 8 agree with me if you don't agree with it. 9 A. I -- 10 Q. Don't agree just 'cause it's getting late in 11 the day. 12 A. I think that it is the same. Certainly 13 these materials were not designed to talk about the 14 federal law in other -- or -- or law in other states. 15 Q. Well, you talk about the federal law in 16 there. As we go down the road, we're going to see. 17 A. You'll get to a point, yes. 18 Q. Yeah. So you talk about federal law in this 19 presentation. 20 A. Sure. Not the -- all of these -- 21 Q. No, no, no. 22 A. All of these slides that you're talking 23 about are largely quotes or paraphrases from Utah 24 Code. 25 Q. That doesn't mean they're unique to Utah and</p>	<p>Page 264</p> <p>1 not applicable to Maine or the -- all the other 50 2 states, does it? 3 A. I -- I suspect that most states, outside of 4 Louisiana, have statutes that are some -- are -- 5 are -- are very similar. 6 Q. And then there's the defend your home which 7 I'm not going to discuss. 8 MR. BENJAMIN: Can I ask a question? 9 BY MR. LILLEY: 10 Q. And then there's -- 11 MR. BENJAMIN: Are we going to get a copy of 12 the -- 13 MR. LILLEY: Sure, you can -- 14 MR. BENJAMIN: You keep saying the next one, 15 the next one, the next one. We're going to have a 16 whole -- none of them are being marked. They're not 17 really identified, lots of them. This is going to be 18 impossible to understand. 19 MR. LILLEY: I'm -- I'm -- I'm giving you 20 the top part of these every time, and these are an 21 expert witness that -- that he's hired and he's, I 22 think, responsible for whatever this guy has written. 23 MR. MARCHESSI: No, you're responsible for 24 identifying -- 25 MR. LILLEY: Forced to arrest or stop or</p>

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1 escape, that's another one, the next one, and that --
2 you can identify it that way, Ed. Okay?

3 BY MR. LILLEY:

4 Q. That's -- there's no escape issue in this
5 case, correct?

6 A. No, there's not. Again, quote from Utah
7 statute. 'Cause there's no issue, I'm not really
8 sure why you're asking me about it.

9 Q. Well, sir, sir --

10 A. But you're right, there's no issue.

11 Q. I'm asking you because I want to know what
12 you teach --

13 A. Okay.

14 Q. -- so that I really want to know that if
15 your teaching conforms to your deposition and some of
16 the statements you've made here. Because what we
17 just decided, and I think you decided because you're
18 the deponent, that these laws are universal in the
19 sense that they're federal law, state law, and
20 probably apparently Utah law.

21 And all I'm trying to do is see if what you
22 teach is what you said in this case to support this
23 man as an expert witness. That's my purpose.

24 A. I see. And I agree that you are correct
25 that you concluded that the Utah law is identical to

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1 federal law. I did not.

2 Q. Do you know of any difference in this area
3 of -- of deadly force? Do you know of any -- any
4 significant difference?

5 MR. MARCHESI: Objection. Form.

6 THE WITNESS: Yes.

7 BY MR. LILLEY:

8 Q. And what is that?

9 A. I'm -- I'm not aware that it is a -- a
10 federal requirement, although I think it's prescribed
11 in a number of cases, to give a warning prior to use
12 of deadly force. That's a statutory requirement in a
13 number of states, including Utah.

14 Q. Okay. Any other differences?

15 A. Not that I can think of off the top of my
16 head.

17 Q. Is refusing to obey an officer's command to
18 drop your weapon a justification in and of itself to
19 shoot that person?

20 MR. BENJAMIN: Objection. Foundation.

21 MR. MARCHESI: Join.

22 THE WITNESS: With that abstract, no.

23 BY MR. LILLEY:

24 Q. Let me get the next one. And this does say
25 Utah Code, and it has some interesting language.

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1 When making an arrest or preventing an escape and the
2 officer reasonably believes -- this is called Utah
3 Code 76-2-402 -- and the officer reasonably believes
4 that deadly force is necessary to prevent the arrest
5 from being defeated by escape and the officer has
6 probable cause to believe that the -- the suspect has
7 committed a felony involving death or serious bodily
8 injury.

9 Let me stop there.

10 So we do use probable cause, at least you do
11 in Utah.

12 MR. MARCHESI: Why are we talking about Utah
13 law in a case governed by federal law.

14 MR. LILLEY: Relevance is not an issue here.
15 Hold your -- hold that for the courtroom when we have
16 rules of evidence.

17 MR. MARCHESI: We don't have them here?

18 MR. LILLEY: We do not.

19 MR. MARCHESI: Oh, that's interesting. I
20 wasn't aware of that.

21 MR. LILLEY: Well, we have some, but we
22 don't have the same as we do in court. You know
23 that. You should know that. Even up in Waterville
24 they know that. Go ahead. You're always talking
25 about country boy stuff, read the rules.

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1 MR. MARCHESI: Okay.

2 BY MR. LILLEY:

3 Q. Okay. What do we have here? Is that --
4 that's probable cause to believe the suspect has
5 committed a felony. That's the probable cause, the
6 same probable cause we talked about earlier today.

7 MR. MARCHESI: Objection.

8 MR. BENJAMIN: I'm going to object 'cause
9 you're mischaracterizing. You're dealing -- dealing
10 with an escape situation now.

11 MR. LILLEY: Yes.

12 MR. BENJAMIN: That's not --

13 MR. LILLEY: It's an escape situation. I'm
14 dealing with probable cause. Now, you're arguing
15 with me about questions and you shouldn't be.

16 MR. BENJAMIN: You're saying it's the same
17 thing we talked about earlier, and it's not.

18 MR. LILLEY: I'm saying it's the same
19 concept, probable cause.

20 MR. BENJAMIN: No, it's not.

21 MR. LILLEY: Well, you're wrong.

22 MR. BENJAMIN: It's --

23 MR. LILLEY: If you believe that, fine.

24 Save it for sometime when it's relevant.

25 MR. BENJAMIN: No, I'll make my objections

1 when I feel like it.

2 MR. LILLEY: Yeah, I'm sure you will. You
3 both do.

4 MR. MARCHESSI: That's our job.

5 MR. LILLEY: No. Your job is to follow the
6 law.

7 BY MR. LILLEY:

8 Q. The officer has probable cause to believe
9 the suspect has committed a felony.

10 That's not in this -- in this particular
11 case, I think I -- was my last question.

12 Is it or isn't it?

13 A. You know, I got to tell you, when I sat down
14 to look at this case, I truly did not take the Utah
15 law from five years ago and apply Utah law five years
16 ago to this case. So I haven't thought these issues
17 through, but making a legal conclusion on something I
18 haven't been asked to opine on today --

19 Q. Well --

20 A. -- I'll tell you that I think that your
21 understanding of Utah law is -- as you apply it to
22 the facts of this case, I think you've just made an
23 accurate statement.

24 Q. Okay. Then the next statement is, sir, one
25 that does apply to -- to this case, I think, but let

1 me ask you because you're the expert.

2 The officer has probable cause to believe
3 the suspect poses a threat of death or serious bodily
4 injury to the officer or others.

5 Let me stop there.

6 That certainly is the standard, isn't it,
7 nationally?

8 MR. MARCHESSI: Objection --

9 MR. BENJAMIN: Object.

10 MR. MARCHESSI: -- form.

11 MR. BENJAMIN: Go ahead.

12 THE WITNESS: I -- I've not seen the Court
13 phrase it that way.

14 BY MR. LILLEY:

15 Q. Okay.

16 A. But I'll --

17 Q. Go ahead.

18 A. And -- and I don't know -- I mean, I looked
19 at a few other states. I -- I can tell you I've
20 looked at Arizona's deadly force statute relatively
21 recently. It doesn't quite read like this. I -- I
22 looked at California's. It doesn't quite read like
23 this. I -- I don't know Maine's. I can't speak to
24 every statute in all 50 states.

25 Q. No, I understand, sir. And I'm not -- this

1 isn't a gotcha or surprise thing. What I'm doing is
2 talking to you about the concepts you must have
3 thought about when you decided that this man was
4 justified in killing my client. That's why I'm
5 asking you about it.

6 So I think you have thought about these
7 concepts, and I'm going to ask, didn't you think
8 about concepts that included probable cause to
9 believe that the suspect posed a threat of death or
10 serious injury when you reviewed this case and came
11 to your conclusion?

12 MR. MARCHESSI: I object. Legal standard is
13 a reasonable belief, not probable cause.

14 MR. BENJAMIN: And it's been asked and
15 answered.

16 MR. MARCHESSI: Multiple times.

17 THE WITNESS: I certainly considered the
18 basis that Deputy Mangino had to use deadly force.

19 What I did not do is I did not think about a
20 situation of preventing an escape and whether all of
21 these sections of Utah Code 72-2-402, and that's not
22 entirely accurately because there's actually a
23 subsection from which this is directly quoted. I
24 didn't think about that, so no.

25 ///

1 BY MR. LILLEY:

2 Q. You didn't think about it.

3 Okay. And you haven't heard other cases not
4 involving escape that -- in which the Court uses
5 probable cause to believe that the suspect poses a
6 threat of death or imminent, actually -- they usually
7 say that, you don't have that in there, but bodily
8 harm, imminent death or bodily harm?

9 A. I -- I don't have that because that's not
10 written into the Utah Code when it comes to escape.
11 But if you want to let me take a look at a court case
12 that you're referencing --

13 Q. Well --

14 A. -- off the top of my head, I can tell you
15 I'm not familiar with courts that use the language
16 you've just quoted.

17 Q. That -- that use the term "probable cause."

18 A. In the context that you just quoted.

19 I think that I have read a case in the past
20 dealing with an escapee who was injured when he was
21 going over the fence at the Utah State Prison where
22 this language is quoted, and I think the Court may in
23 that case use this language. I don't remember.

24 Q. Okay. The next -- the next PowerPoint I'm
25 going to call on, then, is -- that appropriate to

1 call them PowerPoints?
2 A. You can. I -- I think it was a Word Perfect
3 thing, but I don't care.
4 Q. Well, okay. Let's leave it at that, then.
5 It says "Deadly force warning," and you've
6 written under just one bullet, "If feasible, a verbal
7 warning should be given prior to any use of deadly
8 force."
9 A. Correct.
10 Q. And is that your belief?
11 A. Again, it's -- it's both -- it is my belief,
12 and it's also a quote from Utah law.
13 Q. And it also applies to federal law, does it
14 not?
15 MR. BENJAMIN: Objection. Form.
16 BY MR. LILLEY:
17 Q. Or do you know? If you don't know, say so.
18 A. Generally.
19 Q. Then you've got something called general --
20 excuse me.
21 The next one -- next one is entitled "Deadly
22 focus" -- I'm sorry. Let me start over again.
23 MR. LILLEY: How long have we got left?
24 VIDEOGRAPHER: You have 35 minutes.
25 MR. LILLEY: Okay. I'm going to try to

1 finish.
2 BY MR. LILLEY:
3 Q. "Deadly force summary," it's entitled. It
4 says, "General rule" -- you wrote this -- "deadly
5 force may be used" -- am I right when I say you wrote
6 this?
7 A. I'm somewhat embarrassed to admit that what
8 I did is I took -- so what follows in the tab, the
9 students at that time -- it's no longer true, but the
10 student at that time would have had to have memorized
11 this section in order to successfully fill in the
12 blank question on a test they had to pass.
13 So did I write this? Yes. I took from
14 someone else.
15 Do I believe this as an accurate summary of
16 Utah law for police academy students? I do.
17 Q. And, in fact, they have to memorize it,
18 you're saying, in order to pass their course.
19 A. I'm -- I'm saying that they have to -- I
20 don't remember the exact blanks, but they have to --
21 they've got to fill in the blank and write poses or
22 presents a threat of death or serious bodily injury.
23 And then I think it says and deadly force is -- and I
24 think the next blank is reasonably necessary. I -- I
25 don't remember, but in 2000 --

1 Q. You just said they had -- sorry.
2 A. Sure. In 2010, there was a
3 fill-in-the-blank question that if they memorized
4 what I put on the screen, and I might have even given
5 them a hint in class, they passed that question.
6 Q. Okay. Let's look at what they had to
7 memorize and what you wrote.
8 "Deadly force summary. General rule, deadly
9 force may be used. Anytime there is probable cause
10 to believe the suspect poses a threat of death or
11 serious bodily injury and deadly force is reasonably
12 necessary to meet that threat."
13 Did you write those words?
14 MR. MARCHESI: Objection. Form.
15 THE WITNESS: I don't think I wrote them
16 originally, but I certainly put them in my
17 presentation.
18 BY MR. LILLEY:
19 Q. And if you used the word probable cause that
20 these students have to memorize in order to pass your
21 course.
22 MR. MARCHESI: Same objection.
23 THE WITNESS: Not my course, not my test,
24 not my learning objectives, not my outline, and not
25 my words, but yes.

1 BY MR. LILLEY:
2 Q. And so you did use probable cause here just
3 in deadly force summary. This isn't a escape
4 situation or a recent crime situation. This is the
5 general rule, you -- you've got it under deadly force
6 may be used anytime there is probable cause.
7 MR. MARCHESI: Same objection.
8 BY MR. LILLEY:
9 Q. Just so we're clear that you're using that
10 concept in teaching people that have to memorize it.
11 MR. MARCHESI: In the context of Utah law.
12 BY MR. LILLEY:
13 Q. In the context that you said, quite obvious.
14 A. You -- you are correct that in the
15 context -- and you'd kind of have to go back to how
16 you started. In the context of teaching the students
17 about the principle of justification under the
18 criminal code in the state of Utah, they must, as
19 part of their criminal law class, pass this course.
20 And as part of their criminal law class, they ought
21 to be able to recite that.
22 Q. And the next one is called "Tennessee versus
23 Garner."
24 That's a seminal decision in this area, is
25 it not?

1 A. It is.
2 Q. And you talk about the Supreme Court and
3 that you give -- I take it the language there would
4 be language that they used in that. That's an old
5 case, is it not? That's in the '80s, as I recall.
6 A. 1976.
7 Q. '76. Even older than I thought.
8 That, I take it, is --
9 A. I mean --
10 Q. -- we called it horn -- we used to call it
11 Hornbook law.
12 A. Right. And black letter. I may be wrong.
13 Q. Black letter.
14 A. I think it is, yes. I don't think that's a
15 quote from the Court, but -- but that --
16 Q. Well --
17 A. -- it's an accurate statement of -- of
18 generally what the course is.
19 Q. Okay. Let's look at it.
20 The Supreme Court suggested, the Supreme
21 Court of the United States you're talking about,
22 right? So it's not -- nothing unclear on the record
23 about this.
24 A. Correct?
25 Q. The people that decided Tennessee versus

1 Garner, correct?
2 A. Correct.
3 Q. "The Supreme Court suggested that there are
4 three circumstances when an officer can use deadly
5 force. If the officer is threatened with a weapon,
6 if the" officer -- "officer has probable cause to
7 believe that the suspect poses a threat of serious
8 physical harm or the death to the officer or
9 another."
10 Let me stop there.
11 The -- the Tennessee versus Garner Court
12 used that very phrase that we've been bantering about
13 here, probable cause, to believe that the suspect
14 poses a threat of serious physical harm, did they
15 not?
16 MR. MARCHESI: Objection. Form.
17 THE WITNESS: I don't know. Did they?
BY MR. LILLEY:
19 Q. You said so here, I think, or at least
20 represented it to these people that have to memorize
21 these quotes.
22 MR. MARCHESI: Objection. Form. The
23 decision says what the decision says.
BY MR. LILLEY:
25 Q. Correct?

1 A. I don't --
2 Q. Okay.
3 A. I don't know.
4 Q. Let's go on. It's the same -- it's the same
5 block here that we're looking at.
6 "If the officer has probable cause to
7 believe that the suspect has committed a crime
8 involving threatened or actual serious physical harm
9 or death."
10 So those are the circumstances in which the
11 Court, as you say, suggested that the police officer
12 can use deadly force, correct?
13 A. In the context of the overall discussion,
14 again, applying Utah law to our criminal --
15 Q. No, no, no, no, sir. This is Tennessee
16 versus Garner, right? The federal -- the United
17 States Supreme Court, not -- not Utah, correct?
18 You keep -- you -- look, you -- you -- you
19 can -- you're entitled to your opinion, sir, but
20 you're not entitled to your own facts.
21 Do you understand that?
22 MR. MARCHESI: Objection.
23 THE WITNESS: Let me know when you want me
24 to answer the last question.
25 ///

1 BY MR. LILLEY:
2 Q. Well, let me -- let me withdraw the last
3 question and say it.
4 A. Okay.
5 Q. Do you agree that what you're saying under
6 this big heading, Tennessee versus Garner, that the
7 Supreme Court of the United States uses the words
8 probable cause in two of your subpoints, one, to
9 believe that the suspect poses a threat of serious
10 physical harm or death to the officer or another, and
11 the second one used it if the officer has probable
12 cause to believe that the suspect has committed a
13 crime involving threatened or actual serious physical
14 harm or death.
15 Did you in fact mean to convey to these
16 students that that's what Tennessee versus Garner
17 said, not Utah or any other state jurisdiction?
18 A. What I meant to convey to the students -- if
19 you go back and understand, what you have here is a
20 course on Utah law. What I meant to convey to the
21 students is here's the doctrine of justification,
22 here's the Utah statutes, and now we get to the
23 United States Supreme Court and you'll see that the
24 United States Supreme Court principles are reflected
25 in Utah statutes.

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<p>1 Q. Okay. And they include the word probable 2 cause -- 3 A. I don't remember whether they do or not. 4 Q. But you put it there. 5 A. Did I? 6 Q. Well, it's right in front of you. 7 A. Yes, it is. 8 Q. On two occasions, correct? 9 A. Yes. 10 Q. Let's move over to the next one. It's 11 called Graham versus Connor. Graham versus Connor, 12 you tell the -- the students in this PowerPoint that 13 a three-part test to measure reasonableness of 14 force -- of force in a civil lawsuit against an 15 officer. And -- and not a Monday morning 16 quarterbacking. And the third one is measured by 17 standard of reasonable officer at the scene. And 18 under that you put the severity of the crime. 19 There's no crime in this case. We've already talked 20 about that ad nauseam, correct? There's no crime 21 that Mr. McKenney had perpetrated that you can 22 discern from your review of the case? 23 MR. MARCHESI: Objection. You're misreading 24 that. 25 ///</p>	<p>1 BY MR. LILLEY: 2 Q. Is that correct? 3 MR. MARCHESI: Objection. 4 THE WITNESS: I'll agree certainly with the 5 ad nauseam comment. I haven't looked to see 6 whether -- I didn't evaluate this case under Maine 7 law to determine whether Mr. McKenney -- 8 BY MR. LILLEY: 9 Q. Sir -- 10 A. -- had committed a crime or not. 11 Q. -- when you evaluated whether the officers' 12 conduct was reasonable, you must have considered 13 whether the suspect had committed a crime, hadn't 14 you? 15 A. Sure. 16 Q. And you said before that there was no 17 probable cause to arrest him for a crime and that he 18 hadn't. 19 Isn't that a summary of your testimony? 20 A. That is accurate. 21 Q. Now, the second one is whether the suspect 22 presents an immediate threat to officers or of the 23 public, and the word "immediate" is something that 24 you gleaned from Graham versus Connor, correct? 25 A. I may have. I don't recall what the</p>
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<p>1 decision is. 2 Q. Well, that -- they say that in that 3 decision, don't they? 4 MR. BENJAMIN: Objection. 5 THE WITNESS: My answer stands. 6 BY MR. LILLEY: 7 Q. That is the law, then. How about that? 8 Whether they say it or not, that it has to be an 9 immediate threat. 10 You agree? 11 MR. BENJAMIN: Objection. 12 THE WITNESS: I think they -- they may use a 13 different word. I don't remember. 14 BY MR. LILLEY: 15 Q. Is that the law -- 16 MR. MARCHESI: Objection. 17 BY MR. LILLEY: 18 Q. -- that officers only have -- they have a 19 three-part test and one of them is that the suspect 20 presents an immediate threat -- 21 MR. MARCHESI: Objection. 22 BY MR. LILLEY: 23 Q. -- to the officer or the public? Is that 24 part of the -- of the rule? 25 A. So the most recent discussion, of course, is</p>	<p>1 not -- 2 Q. No, no, no. 3 A. No, sir, you -- you asked me what the law 4 is. 5 Q. I'm asking you whether or not that's -- 6 A. No. 7 Q. -- what the Court said. 8 A. You did not. If you want to ask -- 9 Q. Well, let me withdraw that -- 10 A. If you want to ask -- you asked me what is 11 the law? So let me answer that. 12 Okay. The United States Supreme Court very 13 recently -- 14 Q. I'm not -- I'm not interested in that, sir. 15 A. Then don't ask the question what is the law. 16 Q. Okay. I -- I'm sorry. I withdraw. 17 Apparently it was too broad. 18 If you're talking about the recent case from 19 the Supreme Court, that's a case involving a fleeing 20 suspect, is it not? 21 A. It's not. I'd be happy to discuss it with 22 you -- 23 Q. Well, I'd rather not discuss it with -- with 24 the -- with the limited time we have. 25 A. All right.</p>

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1 Q. It is not the situation and the fact pattern
2 in this case, is it, sir?

3 A. Nor was it similar to Tennessee versus
4 Garner or Graham versus Connor.

5 MR. BENJAMIN: Objection.

6 THE WITNESS: You're correct.

7 BY MR. LILLEY:

8 Q. And then you talk about poor reporting. I
9 don't know if I have -- yeah, you're right there.
10 Good.

11 Use of forced continua. Promote reporting
12 conclusion not facts. This is entitled "Poor
13 reporting."

14 What's use of force continua briefly?

15 Because our time's getting short.

16 A. In the early part of the 1960s, a
17 Los Angeles police captain wrote a paper in which he
18 proposed assessing a teaching force according to a
19 use of force letter that -- that led to a number of
20 continua -- continuum that were progressive,
21 primarily linear, sometimes escalating on an X and Y
22 axis, methods for teaching assessment of -- of force.
23 There has been an academic discussion going on for a
24 number of years, still quite a vibrant discussion
25 with the current -- with the Civil Rights section of

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1 talking about some --

2 BY MR. LILLEY:

3 Q. Well, I've got it in here.

4 A. Yeah, that -- and that's the challenge. And
5 that's the challenge is that many people read that
6 and they -- they jump to that conclusion --

7 Q. Okay. Well --

8 A. -- because that's the easy thing to derive
9 from it.

10 Q. So I -- I had it wrong.

11 A. No. I -- I'm telling you what you -- you
12 had was what most people conclude from that teaching
13 model, and it -- it's probably not -- I -- and if you
14 read my article, you know that I don't think that's
15 the best model for teaching assessment of force.

16 Q. You used to teach it and you've decided it's
17 not effective.

18 A. Well, the Utah police academy used to teach
19 it as a requirement.

20 I made the -- I was the one who -- who
21 really started that fire to get rid of it. And this
22 course was presented at that time of transition.
23 That's why as you go through here, you'll see an
24 extensive discussion.

25 Q. Okay. Before I leave that, when it says

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1 the United States Department of Justice and it has to
2 do with should we use use of force continua or should
3 we teach a different system for law enforcement
4 officers based on the objective -- objective
5 reasonableness language of Graham versus Connor?

6 So use of force continua, this section that
7 you're about to get into deals with a theory of or
8 promoting the theory of doing away with use force
9 continua, something that at this time was new in the
10 state of Utah. Many agencies, many officers would
11 have been familiar with --

12 Q. I really have to cut you off here because
13 I -- that's way beyond the scope of my question. But
14 I understand.

15 A. Well --

16 Q. And -- and essentially the continuum is --
17 and you wrote an article on this that I read
18 somewhere along the line. The continuum is
19 essentially using the least amount of force to the
20 greatest amount of force, is that -- and you do one
21 step at a time. That was my understanding.

22 MR. BENJAMIN: I'll -- I'll object.

23 BY MR. LILLEY:

24 Q. Is that correct?

25 MR. MARCHESSI: Join the objection. Are you

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1 under "Contrast," you've got assaultive actively
2 resisting. These are the kind of things -- I -- I'm
3 reading this, I may be reading it wrong, that you're
4 suggesting to the police officer, the new recruit or
5 whoever you're talking to, that they -- this is the
6 kind of thing that they should report in their -- in
7 their cases where they have deadly force issues,
8 correct?

9 A. No.

10 Q. Okay. Well, when it says I will kill you,
11 assuming a fighting stance, thousand-yard stare,
12 closing distance, clenched fists, scanning the area
13 are you -- I -- I know you're talking about
14 reporting, what the officers should report rather
15 than conclusions, I think you said.

16 A. Precisely.

17 Q. And the fact of the matter is, what you're
18 telling him is to report these things that are clues,
19 or cues I should say, cues to the fact that a person
20 may be gearing up to shoot you.

21 Is that an oversimplification, perhaps, but
22 isn't that what you're going for?

23 A. It's close. What we're looking for here is
24 the contrast. So if an agency has a use of force
25 continuum, it typically will say a person is behaving

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1 with assaultive or active resistance. That doesn't
2 tell me much.

3 So I'm encouraging officers now to assess
4 and report in more detail what you call cues, I like
5 that term, and -- and that's where we're -- that's
6 where this discussion is centered.

7 Q. And if you like the term, sir, isn't that
8 one of the big missing elements in this case for
9 Mr. Mangino, that walking down the road with a gun
10 dangling at his side, nonchalantly, he presented no
11 cues that he was going to fire his weapon at
12 Mr. Mangino? Isn't that the hole in the case?

13 MR. BENJAMIN: Objection.

14 MR. MARCHESI: Objection. Foundation.

15 THE WITNESS: I -- I disagree with your
16 characterization.

17 BY MR. LILLEY:

18 Q. Tell me what cues there were other than him
19 walking down the road with a gun dangling to his side
20 pointed to the ground and walking nonchalantly.

21 What were the cues that caused him to shoot
22 him when he did?

23 A. He --

24 MR. MARCHESI: Objection.

25 THE WITNESS: Sorry. He'd been provided by

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1 other officers that their belief was that
2 Mr. McKenney was targeting him. He had been called
3 to a situation where the dispatch gave him and the
4 other officers information to lead them to believe
5 that there was an emergent situation, that
6 Mrs. McKenney was very -- very concerned, that she
7 reported that she feared that he might use the weapon
8 on himself.

9 They had walked into the home and he --
10 Mr. McKenney had been given commands by the other
11 officers to put the gun down. Mr. McKenney had been
12 told on a number of occasions to put the gun down,
13 albeit some of them had been recorded, some had not.

14 All of those -- all of those factors had to
15 be present in Deputy Mangino's mind. He can't just
16 exclude everything he knows about what's happened in
17 the nanoseconds prior to firing.

18 Q. But the justification has to be at the time
19 of the firing, not some historical basis.

20 Do you agree with that?

21 MR. MARCHESI: Objection.

22 THE WITNESS: As a general proposition, yes.
23 There -- there are some -- there are some limiting
24 factors there, but generally, yes.
25 ///

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1 BY MR. LILLEY:

2 Q. And I'm asking you, my -- my -- my question
3 was more specific.

4 What were the cues that McKenney gave
5 Mangino from the time he started walking down the
6 driveway to when Mangino shot him to death? What
7 were the cues? Give me one.

8 A. He's walking toward Deputy Mangino with a
9 weapon having ignored commands to drop the weapon and
10 having a history now of nearly ten minutes of
11 noncompliance and being armed and being nonresponsive
12 and violent.

13 Q. Walking down the driveway. I'm trying to
14 get you to answer that question --

15 A. I understand.

16 Q. -- not what happened historically.

17 Because I take it you agree with me from
18 your last answer that you can be in the line of fire
19 or have deadly force directed in your -- directed at
20 you at one point, and that can subside and it -- and
21 the facts can change as the day wears on. I mean,
22 things wax and wane, do they not, in these situations
23 from time to time?

24 A. Sure.

25 Q. Okay. So it's the time of the shooting

1 that -- that -- that is the time that we want to
2 freeze-frame what was going on to determine whether
3 there was justification, don't we?

4 MR. MARCHESI: I object to that.

5 THE WITNESS: No.

6 BY MR. LILLEY:

7 Q. Well, what were the cues, then, from the
8 time this man, McKenney, let's say it took him nine
9 seconds, as somebody estimated, I think it was
10 Fournier, going down to where he was shot to death?
11 What were the cues that -- that McKenney gave to
12 Mangino or anybody else at that time?

13 MR. MARCHESI: Objection. Asked and
14 answered.

15 BY MR. LILLEY:

16 Q. From the time he left the building heading
17 down the driveway --

18 MR. MARCHESI: Same --

19 BY MR. LILLEY:

20 Q. -- not anything before.

21 MR. MARCHESI: Same objection. He just
22 answered that a moment ago.

23 THE WITNESS: I -- I can answer that
24 question as a hypothetical because, really, to answer
25 that fairly requires the hypothetical that we vacuum

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1 out of all of the officers' minds what they had
2 observed about Mr. McKenney --

3 MR. LILLEY: Can we stop all these bells and
4 whistles over here with these cell phones. It's
5 distracting and it's rude.

6 BY MR. LILLEY:

7 Q. Go ahead, sir.

8 A. So vacuuming all that information out, he's
9 closing on a deputy with a deadly weapon.

10 Q. And that's the only cue?

11 A. That's the only cue in the hypothetical.

12 Q. And -- and -- and he -- all of that history
13 that you're excluding, if you put that back in, then,
14 Mangino would have been justified in shooting him at
15 the time he was at the house. After -- after the --
16 let me -- let me -- let me sharpen that question now
17 because it's vague, and I apologize.

18 Then Mangino would have been justified in
19 shooting him under the justification that the law
20 provides because he was in imminent fear of deadly
21 force from the time Mr. McKenney was in the house and
22 coming in and out of the house after they had
23 confronted him earlier in the day; is that correct?

24 MR. MARCHESSI: Objection.

25 THE WITNESS: Well, those aren't the facts,

1 certainly, but there are a number of points at which
2 a -- an officer might reasonably have concluded that
3 it was appropriate to shoot at -- at a number of
4 junctures. For example, where Mr. McKenney has
5 raised the weapon, similar to what you've shown us in
6 the one photograph, when he is starting to walk and
7 he's been given multiple commands to drop the weapon.
8 But none of that happened. That -- that's not when
9 it happened.

10 BY MR. LILLEY:

11 Q. That's not when what happened?

12 A. That's not when he was shot.

13 Q. No. And what I'm saying is after that
14 happened, what are the cues that Mr. McKenney gave to
15 Mangino to justify him believing he was all of a
16 sudden or -- that there was some killing that was
17 going to happen, some deadly force against
18 Mr. Mangino? The cues walking down the driveway.

19 A. Again, taking the hypothetical of removing
20 all of the information the officers knew prior to
21 Mr. McKenney walking down the driveway with a loaded
22 weapon, having been given commands to drop the
23 weapon, failing to do that and continuing to advance
24 on Deputy Mangino and his vehicle, none others.

25 Q. So -- so for -- okay.

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1 So from what you're saying, then, as soon as
2 Mangino gave him the commands to drop the weapon and
3 that's when -- when the -- McKenney's at his house
4 and Mangino's down at his car, correct?

5 MR. MARCHESSI: Objection.

6 THE WITNESS: There were a number --

7 MR. MARCHESSI: That's not correct.

8 THE WITNESS: There were a number of
9 points -- I can't --

10 BY MR. LILLEY:

11 Q. Okay.

12 A. -- identify the precise geography, but
13 there --

14 Q. Never mind.

15 A. -- there were a number of points at which
16 Mr. McKenney was given the command to drop his
17 weapon.

18 Q. And as soon as he didn't do that, you're
19 saying that the officer was justified in shooting,
20 correct?

21 A. I'm -- I'm saying that are a number of
22 points at which it may have been reasonable. I've
23 not analyzed those hypotheticals.

24 Q. Well, you have to in order to make a
25 decision about whether or not this -- this officer

1 acted properly, don't you?

2 A. I disagree.

3 I just haven't -- really, I suppose, you
4 could create hundreds, if not thousands, of
5 hypotheticals at different points in time, and I've
6 not analyzed each point in time in a hypothetical
7 question.

8 Q. Because the problem is if you don't have
9 cues, then you're predicting, you're guessing that
10 this man could possibly kill you, that he could
11 possibly or might kill you. But you don't have the
12 ability to say he'll probably kill you because you
13 got no cues.

14 Do you agree with that statement?

15 MR. MARCHESSI: Objection. Form.

16 THE WITNESS: I don't know that I agree with
17 that. I -- I think where you're going, I agree that
18 if a Muslim fundamentalist terrorist or a bank robber
19 kicked that door in right now and there's a window
20 there and started pointing a weapon at you and pulled
21 the trigger back and shouted at you or I yelled at
22 him to drop the gun, I can't predict whether he'll
23 shoot you or not just because he doesn't like your
24 shirt. I happen to like it quite a bit.

25 However, if he did that, sir, I would shoot

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1 him, not being able to predict with a hundred percent
2 accuracy whether he would kill you or not.

3 BY MR. LILLEY:

4 Q. I would too if he's pointing the gun at me,
5 but the gun was never pointed at Mangino.

6 Isn't that the missing element also?

7 A. Even if he --

8 MR. MARCHESI: Objection.

9 THE WITNESS: Even if he came in and started
10 to point the gun at you, sir, I'd certainly --

11 BY MR. LILLEY:

12 Q. Well, if he started to, that might also be
13 justified.

14 But Mr. McKenney never started to use the
15 gun in any fashion when Mangino shot him dead. Those
16 are the facts, are they not?

17 A. Okay.

18 Q. Okay means yes?

19 A. I -- the weapon was not pointed at
20 Deputy Mangino at the time Mr. McKenney was shot.

21 Q. And so your problem is that you're
22 predicting that -- that -- and Mangino is predicting,
23 as he says in his deposition and in his statement to
24 the AG's office, that he thought the guy might or
25 possibly -- and he uses both words, and I'll show you

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1 if you wish -- kill him. But he doesn't say that he
2 probably will kill him because he has no cues that
3 that's going to happen. That's how we decide what
4 people may or may not do, isn't it, sir?

5 MR. MARCHESI: Objection. You're misstating
6 the standard which is a reasonable belief.

7 THE WITNESS: Insofar as -- you know, you're
8 stating a -- a very accurate proposition, and that is
9 that we predict what people are doing based on cues.
10 There you go.

11 BY MR. LILLEY:

12 Q. Right. And there aren't any.

13 A. Well, I disagree with you.

14 Q. Well, except that he's got a gun and he's
15 walking down, but he hasn't pointed it at anybody and
16 he gets executed.

17 MR. BENJAMIN: Objection.

18 MR. MARCHESI: Join.

19 BY MR. LILLEY:

20 Q. Let me withdraw that and suggest to you that
21 even if McKenney started to raise his gun under the
22 situation that Mangino was in, Mangino had good
23 cover, maybe not perfect, he had the rifle or the --
24 the sights pointed on him. Mangino was still not
25 really -- would not really be in imminent danger

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1 under the circumstances of the distance, the rifles,
2 the age, the things we talked about earlier.

3 Do you agree with that?

4 A. No.

5 Q. Okay. Look at -- go through a couple more,
6 if you will. Got to get to our --

7 A. Which page number?

8 Q. I'm aiming for 5 if I can.

9 A. What's the page number?

10 Q. The one with the little kid with a gun --

11 A. Page number on the bottom?

12 Q. Oh, yes, 26. I'm sorry.

13 A. Okay.

14 Q. Here I'm getting a little punchy.

15 This is a -- a -- a PowerPoint that says
16 "How close is too close?"

17 A. Yes, sir.

18 Q. And that's his book. Tueller's book, right?
19 Or his article really.

20 A. Yes.

21 Q. And in fact it says "Developed in
22 March 1983." You're wrong. It wasn't '84. Or maybe
23 he published it in '84. It doesn't matter. Let me
24 withdraw that last statement. I'm sorry I made it.

25 A. Can I phone a friend?

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1 Q. "Developed in March of 1983 by Lieutenant
2 Dennis Tueller of the SLCPD, firearms trainer and
3 world-class pistol champion."

4 You say that. Those are your words, right?

5 A. Yes.

6 Q. "At what distance does the suspect with an
7 edged or impact weapon present a threat?"

8 What do you mean by that?

9 A. So that was the question that was posed to
10 then-Sergeant Tueller. At -- at what distance should
11 I have my weapon out and ready to fire, and
12 Sergeant Tueller's response was to the person who
13 asked the question, I don't know. And that's why he,
14 with Carol Mays and Foster Mayo and a few other
15 people, designed -- designed the exercise that he --
16 that he performed.

17 Q. It's called the 21-Foot Rule, isn't it?

18 A. It is not.

19 Q. It -- you sure it isn't?

20 A. Oh, I am certain beyond anything.

21 Q. If I gave you an article in which Tueller
22 says that it's the -- called the 21-Foot Rule, would
23 you -- would it change your mind? I can tell you
24 there is one.

25 A. You know, I'd be very surprised. I -- I

<p>Page 301</p> <p>1 have been in a number -- Dennis Tueller and I have 2 taught firearms courses together, and I've been in a 3 number of classes where he has said, I never said it 4 was a rule. It's a principle. 5 Q. Well, whatever it is, it's a 21 -- the -- 6 the distance -- the point is the distance was 21 feet 7 that he was doing the testing on with a man with a 8 pretend knife and a man with a pretend gun, correct? 9 A. It's not entirely accurate. He -- it 10 doesn't matter that it was a real gun with blanks. 11 He did exercise this at a number of distances, 12 including 30 feet, including greater distances, 13 closer distances. And his conclusion was that in the 14 majority, the slight majority of the cases, a person 15 standing and holding an impact weapon, that is a club 16 or a stick, a pool cue, or an edged weapon, a box 17 cutter or razor or a knife, could launch an attack 18 and could strike the officer prior to the officer 19 delivering two effective rounds, or at the same time 20 the officer fired, meaning that the officer is firing 21 at the same time that the officer is being stabbed/or 22 struck. 23 Q. And what he says, and I'll quote from his 24 article, Dennis Tueller, "How Close is Too Close?" 25 "We have done some testing along those lines recently</p>	<p>Page 302</p> <p>1 and have found that an average healthy adult male can 2 cover the traditional seven yard distance" -- 7 yards 3 is -- 4 A. 21 feet. 5 Q. -- 21 feet -- "in a time ... (you guessed 6 it) about one and one-half seconds. It would be safe 7 to say then that an armed attacker at 21 feet is well 8 within your Danger Zone." Quote/unquote. 9 You have it there if you want to read it. 10 It's on number -- 11 A. No. I -- I think you're probably quoting 12 from his original article. 13 Q. I am. 14 A. Okay. 15 Q. Isn't that what I should be doing? 16 A. Sure. 17 Q. And that became known -- this finding became 18 known, whether he said it or not, became known in 19 the -- in the profession of law enforcement as the 20 21-Foot Rule. Whether you like it or not, that was 21 what it was known, correct? 22 A. I think Mass Ayoob used that term but others 23 don't, myself included. 24 Q. Okay. 25 THE WITNESS: Remind me, and I'll tell you</p>
<p>Page 303</p> <p>1 how to spell Mass Ayoob. 2 BY MR. LILLEY: 3 Q. Okay. Let me ask you if you agree with the 4 following statement: 5 The traditional use of force continuum 6 begins with officers presence, recognizing that the 7 authority and presence of a uniformed officer may 8 introduce some compulsion into a situation. 9 Do you agree with that? 10 A. Yes. 11 Q. And that drawing a gun adds force, and 12 pointing a gun at a person adds even more force. 13 Do you agree with that? 14 A. I do. 15 Q. Does that include force against Mr. McKenney 16 when he was in his house and two officers were -- had 17 their guns drawn against him? 18 MR. BENJAMIN: I want to -- okay. Drawn -- 19 drawn, not pointed. That's your question, right? 20 MR. LILLEY: Yes. 21 MR. BENJAMIN: Okay. Never mind. 22 MR. LILLEY: Thank you. 23 THE WITNESS: You just said drawn, correct, 24 in your question. 25 ///</p>	<p>Page 304</p> <p>1 BY MR. LILLEY: 2 Q. Yeah. 3 A. Yeah. I think -- 4 Q. Drawing a gun and force and pointing -- 5 pointing a gun at a person adds even more force. 6 A. Sure. I agree with both those statements. 7 Q. And so when those officers came into 8 Mr. McKenney's space with drawn guns, he increased 9 the pressure and the adds force to the situation, 10 in -- in my view, escalating that. I'm adding that. 11 That wasn't said here. 12 Do you agree with that statement that I've 13 now added my little editorial to? 14 A. I agree with that -- with your editorial 15 addition. 16 Q. And -- and it's also said in -- in -- you 17 recognize this as an article you wrote? 18 A. No. 19 Q. You also say in your article -- I'll -- I'll 20 give you the numbers. It's No. 72. 21 VIDEOGRAPHER: Eight minutes remaining. 22 MR. LILLEY: Oh, I'm not going to finish 23 that in eight minutes. 24 BY MR. LILLEY: 25 Q. It's on page 2 of 5 that you wrote an</p>

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1 article called "Use of Force." I think that's you.
2 Is that your article? That's your picture,
3 isn't it?

4 A. That's interesting. That's my picture. It
5 postdates the article. But yeah, I wrote --

6 Q. Well, I got it off the Internet, sir, and
7 that's my best source of law enforcement information
8 is --

9 Did you write the article or didn't you?

10 A. I did, and that's my picture. I was
11 skinnier.

12 Q. You've grown much more handsome, I might
13 suggest.

14 A. I did. I remember --

15 Q. Now that we're friends.

16 A. -- I remember the discussion.

17 Q. Now, let's go back to this.

18 In the -- in the page 2 of 5, you say about
19 this third paragraph in the middle of the paragraph,
20 The Court -- and you're talking about cases. Let me
21 get -- be sure I got the right case. I believe
22 you're talking about McDonald versus Haskins --

23 A. Correct.

24 Q. -- a Ninth Circuit case.

25 A. Seven.

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1 Q. Seventh.

2 The Court stated that the display of weapons
3 and the pointing of firearms directly at persons
4 inescapably involves the immediate threat of deadly
5 force, correct?

6 A. Correct.

7 Q. And the failure to do that, as in this case,
8 doesn't reach the standard, does it, sir? They don't
9 reach the level of deadly force?

10 MR. MARCHESSI: Objection. Form.

11 BY MR. LILLEY:

12 Q. Because they didn't -- he didn't point the
13 gun at anybody. Assume for the moment he didn't
14 point the gun at anybody if you don't believe that to
15 be the fact. This is your article.

16 A. It is. And the Haskins case isn't about
17 that. The Haskins case is -- is not about what
18 you're talking about.

19 Q. Well, sir --

20 A. I don't know whether --

21 MR. MARCHESSI: Please let him finish.

22 THE WITNESS: So you're -- I agree with your
23 proposition --

24 BY MR. LILLEY:

25 Q. It's mine -- it's yours, not mine.

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1 A. Sure. I -- I agree with your proposition
2 that the use and display of a weapon is an increase
3 of force. In Haskins, there -- there wasn't any --
4 any shooting. This was -- and this whole discussion
5 here -- this -- this whole discussion followed --
6 it's a follow-on to an earlier discussion about when
7 it is that an officer may be civilly liable for
8 merely pointing a gun. And in this case, Haskins, if
9 I recall right, it's a kid, an eight or nine year old
10 or ten-year-old kid who's in a home and an officer
11 uses some aggressive language and says something
12 like, I will blanking shoot you and points a gun.

13 There's no injury, and so the question is
14 can you have a cause of action under Section 1983
15 where there's no injury but there is a threat and a
16 display of a weapon.

17 So that's when the Court's talking about
18 involving a threat of deadly force, the Court is
19 talking about this officer's verbal threat to use
20 force.

21 Q. I understand what you're saying.

22 A. If I recall the case correctly, and I
23 believe I do.

24 Q. But what I'm saying to you, sir, is that
25 you've cited that case, you've cited another case

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1 called Robinson versus Solano County.

2 A. County. That's a Ninth Circuit case.

3 Q. That's a Ninth Circuit case. And these are
4 your words, The Court stated that the display of
5 weapons and the pointing of firearms directly at
6 persons inescapably involves the immediate threat of
7 deadly force.

8 Let me continue. You're quoting from the
9 Court.

10 A. Correct.

11 Q. This is the Court's language put on this
12 article by you. You understand that.

13 A. Sure.

14 Q. And it goes on to say, Such a show of force
15 should be predicated, said the Court, on at least a
16 perceived risk of injury or danger to the officers or
17 others based upon what the officers know at the time.
18 These are the very ingredients relevant to an
19 excessive force inquiry. End of quote. Correct?

20 A. Sure.

21 Q. And so the point is whether it's directly on
22 your articles thesis, the point you're making here in
23 citing the Supreme Court -- or the circuit court
24 rather, is that -- is the display -- it's pointing --
25 not the display. I -- I just said the opposite --

1 pointing of the firearms directly at persons. This
2 is the -- the very ingredient or at least one of them
3 relevant to excessive force inquiry. That's what
4 you're saying in this article in citing the Court,
5 right?

6 MR. MARCHESSI: Objection.

7 THE WITNESS: Not really, but I get where
8 you're going with it. That's not the issue in this
9 whole -- you've got one article out of a series of
10 discussions, and that's not the issue in this
11 discussion. It's not the issue in this article.

12 BY MR. LILLEY:

13 Q. Well, sometimes --

14 A. That is an accurate quote, I believe, from
15 the Court.

16 Q. And I'm just saying that the opposite of
17 that, where -- where a person does not point a gun, a
18 firearm directly at a person, they haven't risen to
19 the point where you can use excessive force because
20 there is no inescapable conclusion that there's
21 immediate threat.

22 Do you agree to that?

23 MR. MARCHESSI: Object to the form of the
24 question. It talks about perceived risk.

25 MR. BENJAMIN: Join.

1 THE WITNESS: I -- I don't -- I can't agree
2 that what you're talking about in the McKenney case
3 is the opposite of an officer being held civilly
4 liable or at least whether a cause of action lies in
5 Section 1983 --

6 (Clarification by the Reporter.)

7 THE WITNESS: Section -- Title 42,
8 Section 1983, whether a cause of action lies for
9 liability when the officer points a weapon in the
10 absence of any perceived threat and uses language
11 that is threatening language. That's what this --
12 that's what Haskins is about. It's similar to
13 Solano. It's what the -- the Holland case, which is
14 also cited in here, Tenth Circuit case is about.
15 This isn't about shooting.

16 BY MR. LILLEY:

17 Q. We can learn from Supreme Court in other
18 cases on dicta and other things that are not directly
19 related to the facts of the case, can't we, as
20 lawyers?

21 A. Sure.

22 Q. And that's really what you're doing. You're
23 bringing the principle that we're talking about that
24 applies to this case in through -- I know you have
25 another goal for your article, but you cite it as

1 something the Court said in those cases that apply to
2 all cases, don't they?

3 A. I cited --

4 MR. MARCHESSI: Objection.

5 THE WITNESS: -- as you said, dicta Hebdo
6 case to try to advance a particular argument that had
7 nothing to do with shooting.

8 VIDEOGRAPHER: A minute and a half.

9 BY MR. LILLEY:

10 Q. Had nothing to do with shooting? Sorry.

11 A. This is not --

12 Q. You just got done saying the Court said
13 pointing a gun at anybody is -- is -- is -- is deadly
14 force.

15 A. Correct.

16 Q. So it is about shooting, isn't it?

17 A. No. The case in --

18 Q. I'm not talking about the case. I'm -- what
19 the Court said.

20 A. Okay. What the Court said is in a case that
21 has nothing to do about shooting.

22 Q. So it's dicta.

23 MR. MARCHESSI: Objection.

24 THE WITNESS: I'm saying that -- that this
25 is not a case where anyone was ever shot --

1 BY MR. LILLEY:

2 Q. Then why did you cite it?

3 A. -- that was not the issue.

4 Because the -- this -- this entire article,
5 as I've pointed out now several times, is not about
6 shooting. It's a whole different discussion in the
7 force realm.

8 MR. LILLEY: Okay. I guess we're probably
9 at the end of that tape. I think we're going to have
10 to go a little longer, gentlemen. Sorry, but doing
11 my best.

12 VIDEOGRAPHER: We're going off the record.
13 It is 4:25.

14 (Short recess taken.)

15 VIDEOGRAPHER: This is Tape No. 5 in the
16 videotaped deposition of Kenneth Wallentine. The
17 time is 4:38. We're back on the record.

18 BY MR. LILLEY:

19 Q. We're reaching the end here, sir. I keep
20 promising that, but I mean it.

21 A. Look at the bright side. If you only go
22 14 minutes, you only get billed for six hours.

23 Q. True.

24 A. You go 15, you hit the 7-hour portion. So
25 take what time you need, as long as I'm home by 6.

1 Q. I've put in front of you the statement --
2 A. This?
3 Q. Yes, the statement of Mr. Mangino, which I
4 assume everybody has --
5 A. It's the attorney general statement.
6 MR. MARCHESI: Yeah.
7 BY MR. LILLEY:
8 Q. From the attorney general, and -- and I want
9 to talk a little bit about the statements that he has
10 made and ask you what impact, if any, you considered
11 that on your conclusions.
12 If you'd -- if I can find it at this late
13 hour.
14 If you look at Mr. Mangino's testimony going
15 back -- I think we should start probably -- just a
16 second -- at -- let me see here. Hold on just a
17 moment. I'll give you the page number.
18 A. Okay.
19 Q. Before I -- I'm looking at page 26 of that
20 statement. It says on the bottom on Browns & Myers,
21 Inc.
22 Do you have that?
23 A. I do, and I'm on page 26.
24 Q. Okay. Before we get there, do you -- I -- I
25 wasn't sure I understood completely your answer about

1 hiding or getting cover behind the engine block.
2 A. Okay.
3 Q. Were you suggesting that the .357 Magnum
4 bullet could go through the engine block?
5 A. I was not. I don't believe that it can.
6 Q. Okay. So if you -- if you start on page 26,
7 I'm going to ask you about a couple of -- of
8 statements that Mr. Mangino made to the attorney
9 general, and this was done, I believe, quite soon
10 after. Let me just get the time frame.
11 It says April 18th, and the -- and the
12 shooting was on the 12th. So this was done six days
13 later.
14 MR. MARCHESI: I just want to indicate for
15 the record that I think all the parties have found
16 some errors in the transcription of the statements to
17 the attorney general. Counsel, you're certainly
18 welcome to examine the witness based on the
19 statement, but --
20 MR. LILLEY: Thank you. I really appreciate
21 it.
22 MR. MARCHESI: -- I reserve the right at the
23 appropriate time to --
24 MR. LILLEY: Change it?
25 MR. MARCHESI: -- to rely on the actual

1 audio recording to correct any errors.
2 MR. LILLEY: I'm going to assume the AG's
3 office transcribed it accurately.
4 BY MR. LILLEY:
5 Q. So if you look at page 26, and this is the
6 area that I'm interested in getting some feedback
7 from you.
8 And it's -- it's talking about -- PG is the
9 AG investigator, I believe. And -- and NM is
10 Mr. Mangino.
11 So I'm starting at -- to -- to look on
12 page 34, and I'll have a few pages thereafter, and
13 I'm going to try and keep it fairly narrow.
14 MR. BENJAMIN: Are we --
15 BY MR. LILLEY:
16 Q. Are you on the right page?
17 A. Did you say --
18 Q. Twenty-six?
19 A. -- 34? Okay. Twenty-six. I -- I'm sorry.
20 I thought you said 34 after that.
21 Q. Do you have 26?
22 A. I have 26.
23 Q. So in the middle, you know, about a third of
24 the way down, Mangino says, At some point after the
25 suspect stopped --

1 A. Starts.
2 Q. -- starts walking down the driveway, I am
3 like, okay, he is coming at me. I don't remember if
4 I get it over -- if -- it over the hood or it was
5 almost like I kind of creped around the side of the
6 car by where the full bumper is and I popped up a
7 little over the hood. I had my front sights on him
8 now. He made it, I would -- I would say halfway down
9 the driveway, and I said, I'm not letting him get any
10 further because I know my training said action beats
11 reaction, and he has got a firearm and it is already
12 pointed at me. He -- I know -- I don't know. I'm
13 scared for my life. I'm thinking -- I am thinking
14 that he's coming to kill me. And then he says, I
15 have a civilian ride-along. But let me stop there if
16 I can and I'll pick it up after.
17 Do you understand at least from that
18 statement a fair reading is that at some point when
19 the suspect starts walking down the driveway, he,
20 meaning Mangino, has his front sights on him? Did
21 you consider it that way when you evaluated it?
22 A. I believe that -- I did consider it that
23 way.
24 Q. Okay.
25 A. Excuse me.

1 Q. And -- and did you understand that he had
2 made a conscious decision that he was not going to
3 let him get any further down the driveway?

4 A. That's certainly what you can take from
5 this.

6 Q. Now, that doesn't sound like fear of the use
7 of imminent force by -- by -- by -- by the subject,
8 Mr. McKenney. But we haven't read it all yet, but at
9 least at that point, he seems to be saying, does he
10 not, that he's going to fire at this guy if he goes
11 by some perhaps imaginary line down the driveway.

12 Is that a fair reading that you concluded
13 when you looked at it?

14 MR. MARCHESI: Objection. Form.
15 Foundation.

16 THE WITNESS: I -- I read this to believe
17 that he was prepared at this point to fire.

18 BY MR. LILLEY:

19 Q. Well, I understand that. He's got his
20 sights on him, right?

21 A. Well, at least intermittently he does.

22 Q. Well, it doesn't say intermittently, does
23 it?

24 A. It does not.

25 Q. It says, I -- so I might just stick to what

1 was said rather than what we --

2 A. All right. It says that I had my front
3 sights on him now, so --

4 Q. So he's -- he's ready to shoot, correct? At
5 least if you take him at his word.

6 MR. MARCHESI: Objection. Form.
7 BY MR. LILLEY:

8 Q. Do you agree?

9 A. I -- I don't know that. What I do know is
10 that at one slice of time, he had his front -- front
11 sights on him.

12 Q. Well, okay. So you believe from what --
13 what I've read so far that he took his sights away
14 from him at some point? I'll -- I'll read more.

15 A. Okay.

16 Q. You -- at least at this point, when he
17 starts to walk down, he says at the -- at the top, At
18 some point after the suspect starts walking down the
19 driveway -- at some point, we don't know exactly
20 where it is -- I had my front sights on him now.

21 At least at this -- when he's walking down
22 the -- the driveway at some point after he starts,
23 this police officer has the -- the rifle sights on
24 the suspect, correct?

25 A. The front sights, yes.

1 Q. And -- okay. Is there some difference
2 between the front -- I mean, I know there's a
3 difference between the front sights and the back
4 sights, but what do you take the "I had my front
5 sights on him" to mean? Anything in particular or
6 just simply the sights?

7 A. I -- I take it to mean that he's generally
8 aiming the rifle at him. He may see through the
9 front sight. That's what my interpretation is here.
10 That -- that's not necessarily the same as having the
11 sights aligned.

12 Q. So if he were going to fire, he would want
13 to align them if he's following generally cape --
14 proper police action?

15 A. If -- if he -- if he's following -- if he's
16 behaving consistently with best practices and
17 firearms training and has the time, it would be
18 better to align the sights, correct.

19 Q. Okay.

20 A. Excuse me.

21 Q. So he says, Because I know my -- said
22 that -- my attorney said action beats reaction, and
23 he's got a firearm, and he says it's already pointed
24 at me.

25 And did you -- so you took that to mean that

1 only his front sights were there because he says, I
2 had my front sight on him now; is that correct?

3 MR. MARCHESI: Objection. Form.

4 THE WITNESS: I -- I don't know. And -- but
5 I interpreted that to mean that he was looking
6 through his front sight.

7 BY MR. LILLEY:

8 Q. He says, I'm scared for my life. I'm
9 thinking he's coming to kill me.

10 Is -- is fear alone justification of the law
11 for shooting a person to death --

12 MR. MARCHESI: Objection --

13 BY MR. LILLEY:

14 Q. -- by a police officer?

15 MR. MARCHESI: Objection. Form.

16 BY MR. LILLEY:

17 Q. Fair alone.

18 A. No.

19 Q. I'm going to move forward a little bit
20 because he's going back to the house, and we've gone
21 over that quite a bit.

22 A. Which page?

23 Q. I'm moving by -- well, let's -- the -- the
24 bottom of page 27. The question is -- is --

25 "I said drop the gun. I yelled to him,

<p>Page 321</p> <p>1 Drop the gun, drop the gun. I have no idea 2 how many times I said it, but I must have 3 said it at least ten times. 4 "Did you get a reaction from him? 5 "ANSWER: No. 6 "QUESTION: Did he look in your 7 direction? 8 "ANSWER: No. It was a vacant stare. 9 Yeah, he would be looking in my direction. 10 He would just keep looking around" and it 11 was -- "but he was very pale. Just like I 12 was not receiving your message. I'm not 13 acknowledging you." 14 Did you take into account that it appears 15 that he might be suggesting that either this -- 16 Mr. McKenney didn't hear him or didn't perceive what 17 he was saying when he said anything to him, from 18 dropping your weapon to anything else he might have 19 said? 20 A. I considered that Mr. McKenney may not have 21 cognitively processed it. 22 Q. And that's a problem, isn't it, when you -- 23 when you just don't know and you're not getting cues 24 from the dropping the gun command, you get nothing 25 but -- I think he says later on a stare, a</p>	<p>1 thousand -- was it a thousand mile stare, whatever 2 that phrase was. 3 That's the problem, isn't it? If you're not 4 getting a response, it may be because there's no -- 5 he's not processing any particular thoughts or 6 communications? 7 MR. MARCHESI: Objection. Foundation. 8 THE WITNESS: Generally it would be better 9 to have some response, yes. 10 BY MR. LILLEY: 11 Q. Yes. 12 So what I'm suggesting is that by his not 13 dropping the gun, maybe -- at least one option -- one 14 possibility is that he either didn't hear it or 15 didn't understand it. 16 A. I don't know -- 17 MR. MARCHESI: Objection. Calls for 18 speculation. 19 THE WITNESS: I -- I don't know whether he 20 heard or understood. 21 BY MR. LILLEY: 22 Q. And I'm asking you this as an experienced 23 police officer. 24 You've -- you've -- 25 A. That's --</p>
<p>Page 323</p> <p>1 Q. -- seen these situations -- 2 MR. MARCHESI: Same objection. 3 BY MR. LILLEY: 4 Q. -- before, correct? 5 A. I could -- yeah, sure. That -- that's 6 possible. 7 Q. Okay. And if you'll turn to page 28, he 8 says -- after -- so how many -- if you had to again, 9 I didn't understand this. Yeah, maybe ten times. 10 You see where I am at the top? 11 A. Yes. 12 Q. Throughout this event. 13 Yeah. And that while he is coming out 14 of the garage and going back in. He said, 15 Coming out of garage, you know. He was 16 walking towards Cook, and I'm telling him to 17 drop the gun. But I don't honestly know. 18 I -- excuse me. He is -- I don't -- honestly 19 I don't know how many times. But I was 20 yelling him -- at him several times to drop 21 it. 22 Is that the -- the area that you say that 23 he -- you concluded that he told McKenney to drop the 24 gun while he was walking down the driveway? 25 A. There are a number of points at which</p>	<p>Page 324</p> <p>1 Deputy Mangino, including this point, tells -- I 2 believe at least ten times, tells Mr. McKenney to 3 drop his gun. 4 Q. But that's while he's coming out of the 5 garage and going back in, this question says, and 6 that Mangino says, Coming out of the garage. You 7 know, he's walking towards Cook. 8 That's not when he's coming down the 9 driveway. Do you understand that? 10 A. I do understand that. 11 Q. So you believe that there are other times 12 that he said to drop the gun? 13 A. Yes. 14 Q. And then finally, on page -- down further, 15 just so that this is in the record, Mangino said, 16 So -- so he made it halfway down the driveway. He 17 was just walking nonchalantly. 18 You see where I got that word? 19 A. I do. 20 Q. I observed the firearm in his -- 21 in his -- I believe it was in his right hand 22 by his leg, you know, just dangling it with 23 his arms. 24 Do you see that? 25 A. I do.</p>

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1 Q. And then he says, That is when I shot
2 him because I wasn't going to let him get any
3 further to cause any harm -- I think it
4 should be -- to my civilian rider or any
5 fellow people around. I knew that I needed
6 to take action because my life was in danger.
7 I was scared.

8 Do you conclude from that, that he shot him
9 because he had drawn the line at some point he wasn't
10 going to let him go by and that he had premeditated
11 that?

12 MR. MARCHESI: Objection. Foundation.

13 THE WITNESS: I -- I concluded that he made
14 the decision to shoot him because he felt that that
15 was the -- the appropriate time for him to shoot.

16 BY MR. LILLEY:

17 Q. Well, I understand that, but that he drew
18 the line at where he was walking in his own mind and
19 wasn't going to let him get any further --

20 MR. MARCHESI: Same objection.

21 BY MR. LILLEY:

22 Q. -- rather than because he was in fear of
23 imminent use of deadly force?

24 A. I don't -- I don't believe that that was his
25 mindset.

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1 Q. Well, you don't believe it.
2 What do you base it on?
3 Do you want to stop and do something --
4 A. Everything that I've seen in the case.
5 No, I'm just going to send a two-word
6 response.

7 Everything that I've seen in the case.

8 Q. The -- the -- the fact of the matter is that
9 you don't know, do you?

10 MR. MARCHESI: Objection. Asked and
11 answered.

12 THE WITNESS: I -- I don't know what
13 Deputy Mangino was thinking at that moment, but --
14 BY MR. LILLEY:

15 Q. But he's telling you what he's thinking,
16 isn't he? He's telling this investigator six days
17 later --

18 A. Sure.

19 Q. -- that this is what he was thinking, I'm
20 not going to let him get any further because of my
21 life was in danger; I was scared.

22 Those are his words, aren't they?

23 A. They are.

24 Q. That's the reason he shot them, isn't it?

25 MR. MARCHESI: Objection. Foundation.

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1 BY MR. LILLEY:

2 Q. Pure and simple, what he said he did six
3 days afterwards. Those are the reasons he shot
4 him --

5 MR. MARCHESI: Objection.

6 BY MR. LILLEY:

7 Q. -- aren't they?

8 MR. MARCHESI: Are you asking for
9 speculation --

10 MR. LILLEY: No, I'm asking him to draw that
11 conclusion. He's analyzing this as your expert.

12 MR. MARCHESI: Objection stands.

13 THE WITNESS: Taking that one -- one
14 paragraph, I believe that you've accurately stated
15 what's in that one paragraph.

16 BY MR. LILLEY:

17 Q. Well --

18 A. I do -- I do, however, not -- I'm not able
19 to ignore everything else that I've seen in this
20 case, which has a number of other inputs into
21 Deputy Mangino.

22 Q. And then if you look at page 29 so that we
23 ensure our factual basis, because you recall you
24 agreed with me if the factual basis is not accurate,
25 the opinions that you own cannot be accurate,

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1 correct?

2 A. I don't think that's precisely what you
3 said. I think you said that the -- if the facts are
4 different, the opinions might be different, and
5 that's what I agree with.

6 Q. So the actual facts are what's important
7 for -- to support your opinion, correct? And I don't
8 think we have to go over this again. I think you've
9 already answered, but go ahead.

10 A. All right. What -- what is important to me
11 is the facts that were available to Deputy Mangino.

12 Q. That's right. And I'm talking -- that's why
13 I'm going right into his transcript of what he said
14 six days later.

15 A. You are, but the actual facts may in fact
16 include things that we discover after the fact not
17 known to Deputy Mangino.

18 So when you say "actual facts" --

19 Q. Well, okay.

20 A. -- that's not accurate.

21 Q. When I say actual facts, when he says he was
22 scared to death, he was afraid he was going to lose
23 his life or danger of losing his life, do you have
24 any reason to doubt that?

25 A. I do not.

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1 Q. So if you turn to page 29, the investigator
2 says:
3 You were -- so you were giving verbal
4 commands when you did that as well.
5 And he says:
6 I don't remember.
7 Did you take that into account as to whether
8 or not he was accurate on any of the verbal commands
9 given that answer?
10 A. I did.
11 Q. And then he says:
12 Again, I don't remember if I gave verbal
13 commands as he was in the driveway, but I
14 could have. But I don't remember a whole lot
15 as he started walking down the driveway.
16 So do you -- did you take that to mean that
17 whether he gave verbal commands or not, which are not
18 on the recordings, as you know, of the police radios,
19 that he's not even sure he gave it? Did you conclude
20 that?
21 A. Did I conclude that --
22 Q. From what he said here, that he's not sure
23 that he -- he doesn't remember. I don't remember.
24 A. I think at this moment, he didn't remember
25 in response to that question.

1 Q. You think his memory came back later?
2 MR. MARCHESSI: Objection.
3 BY MR. LILLEY:
4 Q. This is some time later.
5 Do you think that his memory reappeared?
6 MR. MARCHESSI: Objection. Foundation.
7 Form.
8 THE WITNESS: I --
9 BY MR. LILLEY:
10 Q. From information here, sir, not from speculation.
11 MR. MARCHESSI: Same objection.
12 THE WITNESS: I can answer that question. I
13 don't know that I can answer it from what's on this
14 page.
15 BY MR. LILLEY:
16 Q. Well, no, but is there other information
17 later on that gives you some confidence that he ever
18 gave verbal commands or at least ever gave verbal
19 commands when the man's walking down driveway, which
20 is an issue in this case?
21 A. Sure. There are other statements from other
22 persons as well as other statements from
23 Deputy Mangino that he gave verbal commands that lead
24 me to believe that he did, in fact. I believe that

1 at this moment, he did not remember that.
2 Q. And you think his memory came back, then?
3 MR. MARCHESSI: Same objection.
4 BY MR. LILLEY:
5 Q. I guess you have to, if you think that his
6 memory here was not right and later on, he had a
7 memory of something he couldn't remember six days
8 later, right?
9 MR. MARCHESSI: Objection. He's identified
10 other sources of evidence from the record.
11 MR. LILLEY: I'm talking about Mangino.
12 MR. MARCHESSI: Well, that wasn't your
13 question before. That wasn't --
14 MR. LILLEY: Please.
15 MR. MARCHESSI: -- in your question before.
16 THE WITNESS: Sure. I wouldn't -- I simply
17 wouldn't use those terms because unlike the -- the
18 recording that the videographer has, many people have
19 a misperception that memory works as a videotape. It
20 simply does not. So to say it came back later, I --
21 I don't think I would say that.
22 To say that one may have a different recall
23 at different moments with different stimulus and
24 different questions in different context, certainly.
25 That happens all the time.

1 BY MR. LILLEY:
2 Q. And talking with different people, sometimes
3 that suggests certain facts that may either be true
4 or may be the result of suggestion.
5 Do you agree with that?
6 A. That's a possibility.
7 Q. Mr. Mangino, from what I understand, and let
8 me ask you if you understand the same thing, has
9 never given a statement to the police or anyone else
10 in which he wasn't represented by a lawyer who was
11 present.
12 Do you agree with that?
13 MR. MARCHESSI: Objection. Form.
14 Foundation.
15 THE WITNESS: I -- I don't know. I --
16 BY MR. LILLEY:
17 Q. You understand he had a lawyer during this
18 interview.
19 A. I would not be surprised if he did, so --
20 Q. Paul Reagan?
21 A. On page 2, it says Paul Reagan is there.
22 Now, I'm assuming from the context that -- I'm
23 assuming from the context that he's Mr. Mangino's
24 lawyer. I don't know that to be the case.
25 Q. All right.

<p>Page 333</p> <p>1 A. Well, yeah, I still -- I -- I don't know. 2 Q. Okay. So at the bottom of page 30, he 3 says -- the investigator says -- I'm saying 4 investigator because I can't pronounce his last name: 5 So what is the weapon that you chose 6 when you set up your perimeter? That is the 7 gun that you had and that is the one you 8 fired? 9 And he says on the next page, 31: 10 Anytime we set up a perimeter, always go 11 to the long gun. It's far more accurate. I 12 have more distance if I need to. You know, 13 everything is based off my training. 14 So at least he thought he was setting up a 15 perimeter and that's -- and he gave the reason he 16 used the long gun. 17 Any disputes with that? 18 MR. MARCHESI: Objection. 19 THE WITNESS: I -- I don't know that he 20 thought there was a perimeter set up. Certainly, 21 based on his training, I think he thought that's the 22 direction it was heading. 23 And I -- I agree that it's common in police 24 training that when a perimeter operation is executed, 25 typically, officers are counseled to use</p>	<p>Page 334</p> <p>1 long guns. 2 BY MR. LILLEY: 3 Q. And then he's asked what his target area is. 4 He says: 5 Center around the site as far as 6 shooting him. That center mass that all 7 officers are taught to shoot at, not -- not 8 like in the movies to wound. 9 Is that correct? 10 A. Well, officers are typically taught to shoot 11 center mass. 12 Q. Okay. And then he says: 13 I was trained to shoot at center mass. 14 I put my front sight on the center mass, and 15 when I shot my first shot -- it said he 16 almost sloped around. I'm not sure what that 17 means -- and nothing happened. 18 So apparently, whatever his front sights 19 were doing, he shot looking through his front sights. 20 Do you believe he probably used his entire 21 sight or what's your take on that? 22 MR. MARCHESI: Objection. Foundation. 23 THE WITNESS: I -- I don't know. 24 BY MR. LILLEY: 25 Q. Okay. Did you consider it in your analysis?</p>
<p>Page 335</p> <p>1 A. I -- I did. 2 Q. And what did you -- what -- what position 3 did you take if you had to take one? 4 A. I -- I didn't reach a conclusion. 5 Q. Okay. 6 A. I considered that -- earlier you talked 7 about looking through the front sights. Considered 8 the fact that he had military, excuse me, training 9 with a not dissimilar rifle. 10 Q. Okay. And then he says: 11 So my -- my -- my training says 12 eliminate the threat. The threat is still 13 there. So I brought my front sight up again, 14 and I just started another round, and that's 15 when I saw him hit the ground. 16 So his front sight is working pretty good, 17 isn't it, if he can hit this target with at least a 18 second shot? 19 MR. MARCHESI: Objection. Form. 20 BY MR. LILLEY: 21 Q. Is that a fair conclusion to make? 22 MR. MARCHESI: Same objection. 23 THE WITNESS: It -- it is. It's certainly 24 not a -- I mean, that's -- that's -- doesn't allow 25 for all possibilities, but it's pretty likely.</p>	<p>Page 336</p> <p>1 BY MR. LILLEY: 2 Q. Okay. And when it says, "My training says 3 eliminate the threat," his training may say it, but 4 the law doesn't say it, does it, eliminate the threat 5 if you have a threat similar to this? 6 MR. MARCHESI: Objection to form. 7 THE WITNESS: I'm not -- 8 BY MR. LILLEY: 9 Q. The law doesn't support that, does it? 10 MR. MARCHESI: Same objection. 11 THE WITNESS: I -- I've not seen those words 12 in statute or cases. 13 BY MR. LILLEY: 14 Q. No, you've seen the words that we've been 15 unfortunately going over and over again about 16 immediate threat of deadly force. 17 That's the standard in general, isn't it? 18 MR. MARCHESI: Objection. It is not. 19 THE WITNESS: I've -- I've seen different -- 20 MR. LILLEY: You're interfering with this 21 deposition and you're making comments that are 22 inappropriate. I hate to have to go back to the 23 judge this time again because this time, I think 24 you're going to have to pay for some of this. 25 MR. MARCHESI: Dan, you've threatened that</p>

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1 every time we've had a disagreement. Keep doing it.
2 MR. LILLEY: Oh, no. It's going to happen
3 one of these days, my friend. You can't get away
4 with this forever.

5 MR. MARCHESI: When's the last time -- never
6 mind.

7 MR. LILLEY: Anyway, let's go ahead.

8 BY MR. LILLEY:

9 Q. What -- with regard to eliminating the
10 threat, that's just not the law, is it? You can't --
11 there's no justification to shoot someone when a
12 police officer is saying to eliminate the threat
13 period.

14 MR. MARCHESI: You know, I -- I object.

15 BY MR. LILLEY:

16 Q. Do you agree?

17 MR. MARCHESI: I'm going to -- very -- I'm
18 going to very shortly instruct the witness not to
19 answer. He has not been designated to offer opinions
20 on what the law is, nor would any expert witness, to
21 my knowledge, be allowed to do so. That's the
22 province of the Court.

23 BY MR. LILLEY:

24 Q. Do you agree?

25 MR. MARCHESI: Same objection.

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1 THE WITNESS: My answer stands. I've not
2 seen those terms used in either statute or judicial
3 decisions in that precise phraseology.

4 BY MR. LILLEY:

5 Q. And then if you go over to page 32 of his
6 statement to the AG's office -- no, I'm sorry. Let's
7 keep going. Withdraw that.

8 When -- as soon as Mr. Mangino left the
9 house before -- before he goes down -- before he gets
10 his gun, you understand that he was very excited and
11 that he sprinted down to get his firearm?

12 A. I suspect he moved quickly. I don't know --

13 Q. Okay. Well, let's look at what he said. On
14 page 33, So you guys -- back -- I'm -- I'm about the
15 seventh line down.

16 Backing up to when you first went in the
17 residence and you exited, how long before he
18 exited the house? I mean, if you had to
19 guess, did you have enough time to get to
20 your --

21 And he answers:

22 Well, I sprinted to my car, and as you
23 could imagine, I was very excited.

24 Do you take any issue with that?

25 A. Nope.

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1 Q. And with regard to the -- and then he says
2 later on, just down the page a few more lines:

3 Emotionally excited, however you want to
4 say. I -- I hit him -- I hit the unlock
5 button, I told Zach.

6 And then the investigator says:

7 Meaning that you were afraid because
8 this guy had a gun?

9 ANSWER: I was afraid and knew I needed
10 to arm myself and set up a perimeter and, you
11 know, get myself in a safe position if he
12 came out with the firearm.

13 Do you see where I'm reading?

14 A. I do.

15 Q. And he didn't come out with a firearm, we
16 know factually now, do we not?

17 MR. MARCHESI: He did or did not?

18 MR. LILLEY: He did not come out with
19 firearm and point it at anybody.

20 MR. MARCHESI: Objection.

21 MR. LILLEY: He had a firearm in his hand.

22 MR. BENJAMIN: Objection. Mischaracterizes.

23 MR. MARCHESI: Mischaracterizes the
24 evidence.

25 ///

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1 BY MR. LILLEY:

2 Q. He did not come out with a firearm to point
3 it at anybody in his direction.

4 Do you agree?

5 A. Okay. I -- I saw where you read. I don't
6 see what you've added.

7 Q. Okay.

8 A. So if you've added something, it's not where
9 you read.

10 Q. Well, no, no, no, sir. No, I've added a
11 question.

12 A. Okay.

13 Q. I've read and then added a question.

14 I was afraid and I needed to arm myself
15 and set up a perimeter and, you know, get
16 myself in a -- in safe position if he came
17 out with that firearm.

18 Do you see where I'm reading?

19 A. I do.

20 Q. Now, at that time, the firearm was dangling
21 by the side of Mr. McKenney.

22 Do you understand that to be the case?

23 MR. BENJAMIN: Objection.

24 MR. MARCHESI: Objection. Foundation.

25 THE WITNESS: I understand that at some

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1 point, Mr. McKenney came out with that firearm and
2 that it was by his side.

3 BY MR. LILLEY:

4 Q. Right. And so when he says "get myself in a
5 safe position if he came out with that firearm," he's
6 suggesting, is he not, the cover that he finally
7 accomplished in the event that -- that McKenney
8 raised in some fashion the firearm in his direction?
9 Do you read it that way?

10 MR. MARCHESSI: Objection. Foundation.

11 THE WITNESS: I think I understand what
12 you're asking. I -- I read that he predicted,
13 reasonably so, that if Mr. McKenney came out of the
14 house with the firearm, if he came out into where the
15 officers were, that finding a safe position, finding
16 cover would be part of what he ought to do.

17 BY MR. LILLEY:

18 Q. But he -- you understand the facts are that
19 he went down after they were all in the house, he
20 sprinted down and got his firearm, before McKenney
21 every walked down the driveway.

22 Do you understand that's the sequence?

23 A. Yeah.

24 Q. So he had his firearm in a safe position
25 prior to McKenney coming down the driveway.

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1 Do you agree with me that those are the
2 facts?

3 MR. MARCHESSI: Objection. Form.

4 THE WITNESS: Sure. I think there's some
5 point where Deputy Mangino is in a relatively safe
6 position, and he has his rifle. And at some
7 interlude, then Mr. McKenney comes out of the house
8 and starts walking down the --

9 BY MR. LILLEY:

10 Q. Right.

11 A. -- driveway with his gun.

12 Q. That's all I'm trying to get.

13 The sequence is he's in a safe place with
14 his firearm in place and that McKenney hasn't started
15 walking down yet.

16 Do you understand that to be the sequence?

17 A. I -- I -- my answer stands. That -- that's
18 what I just said.

19 Q. Is that a yes? I'm sorry. Just to make it
20 clear, I want to be sure that's a yes. I take it it
21 is, but I --

22 MR. MARCHESSI: Well, the answer --

23 THE WITNESS: Well, you --

24 MR. MARCHESSI: -- is what the answer is.

25 THE WITNESS: You -- You rephrased my

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1 answer. But what I said was that Deputy Mangino ran
2 down the driveway. He -- he retrieved a rifle. He
3 got himself at one point into a relatively safe
4 position, anticipating, predicting, the word you used
5 earlier, predicting that Mr. McKenney might come out
6 of the house armed with that firearm. And that's
7 exactly what happened.

8 BY MR. LILLEY:

9 Q. And he says on page 34, to follow up on
10 that, I'm just going by sequence. That's the next --
11 well, let's just read the next so I don't get accused
12 of taking it out of context.

13 Sure. And then he says:

14 So I grabbed my firearm and my extra
15 mag. I remember dropping like another thing
16 of my car because I was emotionally excited.

17 Do you see where it says that? Turning over
18 to --

19 A. I do.

20 Q. Okay. And then he says at the last end of
21 that sentence:

22 I knew there is a possibility --
23 particularly concerned about that word, sir,
24 when I ask you the question. I knew there is
25 a possibility that he might come out after us

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1 now.

2 Do you see where I'm reading?

3 A. I do.

4 Q. The possibility and might does not rise to
5 the standard of imminent -- being in imminent danger
6 of deadly force, does it?

7 MR. MARCHESSI: Objection. Form.

8 BY MR. LILLEY:

9 Q. If it's a possibility and it may happen --
10 MR. MARCHESSI: Same.

11 BY MR. LILLEY:

12 Q. -- rather than it's probable to have?

13 MR. MARCHESSI: Same objection.

14 THE WITNESS: In the abstract, something
15 that is a mere possibility, placing that down on
16 the -- on the lower scale of something that is
17 impending, something that is near certain, that --
18 and that certainly is not a high probability. I
19 mean, we can quibble over --

20 BY MR. LILLEY:

21 Q. There's not any probability. It's a
22 possibility. He uses a word -- he uses a word that
23 doesn't reach to probability. Doesn't even use
24 possibility.

25 MR. MARCHESSI: Objection.

1 THE WITNESS: I think most math professors
2 would tell you that all probabilities include
3 possibilities --

4 BY MR. LILLEY:

5 Q. Sir --

6 A. -- and vice versa.

7 Q. Sir, I'm not looking at math here. I'm
8 looking at the fact that he used two words that are
9 very equivocal.

10 Do you -- do you agree? Namely, I knew
11 there was a possibility that he might come out after
12 us.

13 That suggests that it's on the possibility
14 side, not the probability side.

15 Do you agree with what I just said?

16 MR. MARCHESSI: Same objection. And I --
17 his -- he just answered that question, even though
18 you didn't like the answer.

19 THE WITNESS: I agree, as you said, that he
20 used two words that are equivocal.

21 BY MR. LILLEY:

22 Q. And then he says in the next -- very next
23 statement, and when the -- when the investigator says
24 Sure:

25 He might start shooting at us. I don't

1 know. Quote/unquote.

2 Do you see where I'm reading?

3 A. I do.

4 Q. That's not the stuff that you can use to
5 justify shooting another person, another human being
6 to death by a police officer, is it, sir, that he
7 might start shooting? I don't know.

8 MR. MARCHESSI: Objection. Form.

9 THE WITNESS: There are many circumstances
10 in which one may be justified in using deadly force
11 where one -- the adversary might start shooting.

12 BY MR. LILLEY:

13 Q. But the problem is --

14 A. I understand he says I don't know. He did
15 not -- and I -- I suppose this is the crux of your
16 question, Deputy Mangino did not have any certainty
17 at that moment that he was about to be shot.

18 Q. And without that certainty, not complete
19 certainty, because if there are cues and he goes for
20 the gun, he can shoot him.

21 But without that certainty, he hasn't
22 arrived at the point yet where he meets the
23 justification standard under the law, does he, sir,
24 at least with -- with saying what he said there?

25 MR. BENJAMIN: I'm going to object to the

1 foundation because I think your question -- at this
2 point, he's still in the house.

3 MR. MARCHESSI: And I'm going to join that
4 objection.

5 MR. LILLEY: Please, please, please.

6 MR. MARCHESSI: We're certainly not at the
7 point of the shooting.

8 MR. LILLEY: You're -- you're making
9 comments that are inappropriate.

10 MR. BENJAMIN: You're asking if he could use
11 deadly force at a time that deadly force wasn't even
12 used. You're conflating those two things together.

13 MR. LILLEY: Please, please. You know
14 that's improper, Ed. I expect better from you.

15 MR. MARCHESSI: But not me?

16 MR. LILLEY: But not you.

17 MR. MARCHESSI: All right. Well, then I join
18 his objection.

19 MR. LILLEY: Great.

20 BY MR. LILLEY:

21 Q. I mean, he's just too far short of
22 imminent -- fear of imminent use of deadly force
23 against him, isn't he?

24 A. When --

25 MR. MARCHESSI: Same objection.

1 BY MR. LILLEY:

2 Q. Right here, when he says, I knew there was a
3 possibility he might come out after us, he's talking
4 about this particular time about possibilities and
5 might. It's -- it's tentative, isn't it?

6 A. You're right. You -- you know, you're
7 right, because at this moment, at this moment, he
8 can't see any threat. Mr. Mangino, Deputy Mangino
9 can't see any threat, so he ought not to be shooting
10 at a person who's not there. So --

11 Q. So he says --

12 A. -- I agree to that.

13 Q. -- in the next statement he might start
14 shooting at us, I don't know, right? He keeps saying
15 the same kinds of things to say, I just can't predict
16 from what I see, isn't he?

17 A. That -- that's true. He is expressing here,
18 I think, a true fact that he is not able to predict
19 what will happen in the future. I think you're
20 correct.

21 Q. And -- and -- and -- and not being able to
22 have some prediction or cues that it's going to be
23 some sinister situation in which there is deadly
24 force, he's not justified in shooting at that point,
25 at least, is he?

1 A. I agree that at the point that I think
2 you're talking about, he's not justified in shooting.

3 Q. Now, let's -- let's go to -- to -- let's
4 move ahead a little bit. I'm almost finished with
5 this. I keep saying that, but it's really true, I
6 think.

7 Just -- okay. No, it's too late for that.
8 Too late in the day.

9 Okay. There is one other point I want to
10 make -- or I want to have you make with me, if you
11 will, if you will agree. And that is the fact that
12 there were two shots fired. Then I will definitely
13 be done.

14 A. Which page?

15 Q. Let me look a second. Hold on.

16 MR. MARCHESI: If it helps, Dan, I'll
17 stipulate there were two shots fired.

18 BY MR. LILLEY:

19 Q. Let me see where they are in my notes. Here
20 they are. Excuse me just a second. I want to be as
21 clear as I can. Sorry. Too much paper.

22 The -- what he said was, I believe -- if I
23 can find it, is that -- and I'll -- I'll look for it
24 if I -- it's in there, but I'm not sure I can find it
25 in the time we have allotted, so we'll see what we

1 can do.

2 He said that after he -- my -- this is by --
3 from memory, that after he fired his first shot,
4 he -- he saw that -- that that shot had missed.

5 You know that shot had missed, correct?

6 A. I -- I believe that to be accurate. And
7 I -- like Mr. Marchesi, my independent recollection
8 is there was two shots fired.

9 Q. And that he then -- he had his sights down
10 to some degree from what I read from his testimony
11 that I can't find at the moment, but I will, if we
12 have to, and he then put the -- the -- and this is
13 done very quickly of course -- a backup, and he --
14 he -- Mr. McKenney at that point did not raise his
15 gun or do anything from the evidence in this case.

16 Do you understand that to be the case?
17 After the first shot. I know it was very close to
18 the second. But there's no indication that McKenney
19 took any aggressive action, even after he was shot
20 at.

21 Do you agree with that from your review of
22 the matter?

23 A. I -- I think that's a fair statement.

24 Q. And on the second shot, he said -- and I
25 think I've already quoted it -- that his training

1 told him, and he shot him the second time because he
2 was told he had to eliminate the threat.

3 Do you remember my just reading that?

4 A. I think he --

5 Q. Said his training --

6 A. -- said that his training had taught him to
7 eliminate the threat. I remember you reading that.

8 Q. So the second shot, the fatal shot, was a
9 premeditated shot, was it not?

10 MR. MARCHESI: Objection. Foundation.

11 BY MR. LILLEY:

12 Q. He thought about it. His training told him
13 to do this and he shot him the second time, not
14 because he was in fear of his life, but he wanted to
15 eliminate the threat, whatever that means, in his
16 mind.

17 MR. BENJAMIN: Objection to form.

18 MR. MARCHESI: Same objection.

19 THE WITNESS: That -- that wouldn't be my
20 conclusion.

21 BY MR. LILLEY:

22 Q. What would your conclusion be?

23 A. That he perceived that he was faced with a
24 threat of deadly force. He responded to that threat.
25 I don't believe that his statement that -- about his

1 training afterwards suggests in any way that he
2 premeditated that shot with -- with an eye to
3 eliminating.

4 Q. That's what he said.

5 A. I understand what's -- the way you read it.

6 Q. You don't take him at his word?

7 MR. MARCHESI: Objection.

8 BY MR. LILLEY:

9 Q. He said, I shot the second time because my
10 training taught me to eliminate the threat, didn't
11 it?

12 A. You accurately read the transcript, and I've
13 given you my best answer, but I could rephrase it.
14 It will be pretty much identical.

15 Q. Well -- all right.

16 MR. LILLEY: I think I'm finished. Let me
17 just check. I think that's all I have. I leave it
18 to my noisy friends over here now to ask real
19 questions.

20 MR. MARCHESI: All right. Well, I'm going
21 to actually suspend the deposition and leave it open.
22 It's 5:20. The witness has indicated his absolute
23 drop-dead time to leave is 6. Plaintiff's counsel
24 has produced a lot of material today that has not
25 been provided to defense counsel, either prior to

1 today or during the deposition which is going to
2 require me to review that. So rather than trying to
3 rush through it and not complete it in any event,
4 I'll simply leave the deposition open for my
5 questioning. I'm not sure how much the seven
6 hours --

7 MR. LILLEY: My deposition is closed if you
8 don't have any questions.

9 MR. MARCHESSI: No, I'm -- I have the right
10 to ask questions.

11 MR. LILLEY: No, you don't have any such
12 right at all. You're full of shit, so my --

13 MR. MARCHESSI: Get that on the record.

14 MR. LILLEY: My -- my deposition is closed.
15 If you want to leave your deposition open, I think
16 you're going to have to go to the Court.

17 MR. MARCHESSI: No. I'm -- I'm taking the
18 position that the deposition is open.

19 MR. LILLEY: I don't care what position
20 you're taking. The deposition is closed.

21 MR. MARCHESSI: If we could speak one at a
22 time.

23 MR. LILLEY: And if you want to question,
24 it's now 20 after, we're well -- are we still within
25 the seven-hour frame? The court reporter is

1 indicating.

2 How much more time do we have -- any rough
3 idea?

4 (Discussion held off the record.)

5 (Pause in the proceedings.)

6 MR. LILLEY: Okay. So I'm concluding the
7 deposition in which there's plenty of time to --
8 it's -- I have no objection to going as long as it
9 takes, and I'm within 29 minutes of the deadline,
10 since we seem to talk in those things in this case.
11 And I invite you both to question him.

12 MR. MARCHESSI: Well, I appreciate the
13 invitation, and I'll accept it, but not at the
14 present time. The primary problem that I have, and I
15 want the record to be clear, is that there have been
16 a number of rather lengthy documents referred to by
17 plaintiff's counsel today, copies of which were not
18 provided to defense counsel. I've not had an
19 opportunity to review those. And prior to asking
20 questions of this witness, I need the opportunity to
21 do that.

22 There's, more importantly than the
23 29 minutes left in the deposition, because I don't
24 believe I'm bound by that, there are 36 --

25 MR. LILLEY: No, I don't believe you are.

1 You can go on all night if you --

2 MR. MARCHESSI: There are 36 minutes left
3 before this witness has indicated at the beginning of
4 the day, he has other engagements, and I'm going to
5 honor that.

6 And so my position is simply that the
7 deposition is suspended pending reconvening it at an
8 appropriate time under appropriate circumstances for
9 purposes of me making any inquiry that I feel is
10 appropriate.

11 Other than that, I guess I'll turn it over
12 to Ed, and then before we go off the record, although
13 we don't have to do this with the witness, I would
14 like to attempt to identify as accurately as
15 possible, exhibits and then nonexhibit documents that
16 were referred to during the deposition.

17 MR. LILLEY: Well, the court reporter and I
18 have already talked about that. We're going to work
19 that out, so we'll get all the deposition exhibits
20 put together, and we can either put them in the
21 transcript -- do you want them in the transcript or
22 shall we send them directly?

23 MR. MARCHESSI: As I say, I'd first of all
24 like to give Ed the opportunity to say anything he
25 wants to say. But beyond that, there are nonexhibit

1 documents that were referred to and showed to the
2 witness, and I want the record to reflect exactly
3 what those are so we're clear.

4 MR. LILLEY: Let's understand each other.
5 Any document referred to is a document that should be
6 in this record and will be. I put them in a form to
7 be able to lug all this stuff out here without any
8 other help, and so I've had to do it that way.

9 With regard to the -- whatever I used here
10 with your expert designee, all of the information I
11 received I got on the Internet, and I'm sure that
12 you, with the contact and since you hired this
13 gentleman, could get any information or anything he
14 authored quite easy. I had to do it the hard way. I
15 know of no requirement that I have to give you his
16 writings in advance of my cross-examination of your
17 expert.

18 I wouldn't have to do it at trial, and I
19 anticipate that there's a good possibility that
20 his -- his -- his testimony will be elicited at trial
21 by videotape. So I don't think that there's anything
22 left open. As far as I'm concerned, the deposition
23 is closed, and if you want it open, I'm going to
24 suggest to you that we'll have to go to the Court.

25 MR. MARCHESSI: Well, that's fine. I

1 would --

2 MR. LILLEY: Ed.

3 MR. MARCHESI: -- indicate that there are
4 documents not authored by this witness that you
5 referred to, and there's no way I would have known
6 what those were in order to have had the opportunity
7 to retrieve them from the Internet.

8 MR. LILLEY: Okay. Fair enough. There were
9 a couple of documents that I used that are on the
10 Internet, and they're -- they're documents by these
11 well-known folks that have been referred to and are
12 well known in the area of -- of the use of guns in
13 these situations.

14 Lewinski is all over the Internet and the --
15 Tueller -- Tueller is the same and was referred to
16 specifically in your -- in his designation or his --
17 in his report. I believe Lewinski was, but I can't
18 recall for sure.

19 MR. MARCHESI: Okay.

20 MR. LILLEY: So all of this has been known
21 to you, and I took those names and just simply went
22 into the Internet to see what I could find. You have
23 the same opportunity, and a far superior opportunity
24 because he's your paid witness.

25 MR. MARCHESI: All right. I'm not going to

1 say anything further. I simply reserve the right to
2 develop my argument further should the need be
3 necessary.

4 MR. LILLEY: That, you certainly have.

5 MR. MARCHESI: Ed?

6 MR. BENJAMIN: And I'm not going to ask any
7 questions at this point, but I also join in the --
8 just the concern that --

9 MR. LILLEY: Is that a me too kind of
10 joinder?

11 MR. BENJAMIN: Well, I'm just -- I can speak
12 for myself if you'd let me.

13 MR. LILLEY: Well, I just want to know what
14 you just said. I join in means me too, right?

15 MR. BENJAMIN: I join in the concern that
16 there have been things put before the witness that
17 you pulled off the Internet that wasn't -- that we
18 weren't provided, that we weren't provided even
19 today. I'm still -- as I told you on the break, I'm
20 still trying to get things you used for MacVane's
21 exhibit -- deposition two weeks ago --

22 MR. LILLEY: That has nothing to do with
23 this.

24 MR. BENJAMIN: -- that you were supposed to
25 give us. So I don't have any questions at this

1 point. That's all.

2 MR. LILLEY: Fine.

3 MR. BENJAMIN: I understand the witness has
4 to leave.

5 VIDEOGRAPHER: We're going off the record
6 it's 5:28.

7 (Discussion held off the record.)

8 MR. MARCHESI: Hard copy. The whole kit and
9 caboodle.

10 (Exhibit 1, Exhibit 2, Exhibit 3, and

11 Exhibit 4 were marked for

12 identification.)

13 MR. MARCHESI: For the record, what I have
14 as formal deposition exhibits are Exhibits 1, 2, 3,
15 and 4 which are documents from the Force Science
16 Institute, and Exhibit B-1, B-2, and B-3. B-1 is a
17 still photograph of a frame from a videotape, B-2 are
18 four pages from the deposition transcript, and B-3 is
19 another still frame from a video videotape.

20 MR. LILLEY: Which you have copies of.

21 MR. MARCHESI: And in addition, from the
22 notes I made, there were documents identified as
23 pages 94 and 145 from a binder that Mr. Lilley had, a
24 PowerPoint or Word Perfect slide presentation with
25 the notation 2010 KRW, and documents that were at Tab

1 No. 72 of a binder that Mr. Lilley produced today.

2 MR. LILLEY: You'll have copies of all of
3 those.

4 MR. MARCHESI: We will have or we do have?

5 MR. LILLEY: You will.

6 MR. MARCHESI: Will have.

7 MR. LILLEY: I used them here. You will
8 have copies of all those since you requested them.

9 MR. BENJAMIN: You're still on the record.
10 You might want to stay in the room.

11 MR. MARCHESI: And if there are other
12 documents that are identified in the record that have
13 not been given exhibit numbers on behalf of my
14 clients, I -- I request plaintiff's counsel provide
15 us with a copy of those forthwith. The deposition
16 will remain open.

17 (This deposition was concluded at
18 5:38 p.m.)

19 * * * * *

1 Case. McKenney vs. Mangino
2 Case No.: 2:15-cv-73-JDL
3 Reported By: Emily A. Gibb, RPR, CSR, NV CCR 709
4 Date Taken: Friday, November 20, 2015

5 WITNESS CERTIFICATE

6 I, Ken Wallentine, HEREBY DECLARE:
7 That I am the witness in the foregoing
8 transcript; that I have read the transcript and know
9 the contents thereof; that with these corrections, I
10 have noted this transcript truly and accurately
11 reflects my testimony.

12 PAGE-LINE CHANGE-CORRECTION REASON

13 _____
14 _____
15 _____
16 _____
17 _____
18 _____
19 _____
20 _____
21 _____
22 _____
23 _____
24 _____
25 _____

No corrections were made.

I, Ken Wallentine, deponent herein, do
hereby certify and declare under penalty of perjury
the within and foregoing transcription to be true and
correct.

21 Ken Wallentine, Deponent
22 SUBSCRIBED and SWORN to at _____
23 _____, this _____ day of _____, 2015.

24 Notary Public _____
25

1 REPORTER'S CERTIFICATE
2 STATE OF UTAH)
3)
4 COUNTY OF UTAH)

5 I, EMILY A. GIBB, a Certified Shorthand
6 Reporter and Registered Professional Reporter, hereby
7 certify:

8 THAT the foregoing proceedings were taken
9 before me at the time and place set forth in the
10 caption hereof; that the witness was placed under
11 oath to tell the truth, the whole truth, and nothing
12 but the truth; that the proceedings were taken down
13 by me in shorthand and thereafter my notes were
14 transcribed through computer-aided transcription; and
15 the foregoing transcript constitutes a full, true,
16 and accurate record of such testimony adduced and
17 oral proceedings had, and of the whole thereof.

18 I have subscribed my name on this 9th
19 day of December, 2015.

20
21
22
23
24
25

Emily A. Gibb, RPR, CSR, CCR



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